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No. _____

In The
Supreme Court of the United States

October Term 1997

DAYNA R. PATRICK LAYMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Dennis W. Dohnal*
Counsel of Record
BRENNER, DOHNAL, EVANS & YOFFY, P.C.
411 East Franklin Street
Suite 200
Richmond, VA 23218-0470
(804) 644-1300

John E. Lichtenstein
Charles M. Smith, Jr.
LICHTENSTEIN AND FISHWICK, P.L.C.
Liberty Trust Building, Suite 505
101 South Jefferson Street
Roanoke, Virginia 24011
(540) 343-9711

Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

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QUESTIONS PRESENTED

I. Whether the sentencing discretion of the trial court allows it to delay closure of a sentencing proceeding to receive additional information and ultimately to impose a sentence consistent with the court's final oral articulation of sentence but which differs from an initial oral articulation?

II. Whether the trial court loses jurisdiction to sentence a defendant before its entry of the written sentencing order?

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Petition for Writ of Certiorari to the
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for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Dayna R. Patrick Layman, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on July 22, 1997.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 116 F.3d 105 and is included in the Appendix at 1-10.

JURISDICTION

The decision of the court of appeals was issued on June 24, 1997. An order, denying a petition for rehearing, was entered on July 22, 1997. The jurisdiction of this Court to issue a writ of certiorari in this case is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3582(c) provides:

> (c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that...

Section 3582(c) proceeds to list multiple exceptions that neither side argues are applicable to this case. One of the exceptions listed refers directly to Rule 35 of the Federal Rules of Criminal Procedure. Rule 35(c) provides:

> (c) Correction of Sentence by Sentencing Court. The court, acting within 7 days after the imposition of sentence may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

The full text of 18 U.S.C. § 3582(c) and of Rule 35(c) is set forth in the Appendix at 58-61.

STATEMENT OF THE CASE

This case reaches the heart of the issue of the control of the trial judge over the manner and scheduling of sentencing.

The facts, as concern the two issues of this Petition, are not in dispute. Dayna Layman plead guilty to one count of conspiracy to manufacture and distribute marijuana on December 20, 1995.

Layman's sentencing hearing was scheduled for May 17, 1996 at 1:30 p.m. She was one of three co-defendants to be sentenced that day. Due to an unrelated case, the Assistant United States Attorney was delayed, and Layman's sentencing hearing (the first of three sentencing hearings) did not commence until after 4:00 p.m. After extensive testimony, the court found Layman accountable at a total offense level of ten under the sentencing guidelines. Such level allowed the court's consideration of home confinement as well as incarceration. *See* U.S. Sentencing Guidelines §§ 5C1.1(c)(3), 5F1.2 (1996).

While stating "I believe that calls for a period of incarceration of from six to twelve months", the court never addressed the possibility of home confinement in announcing a period of imprisonment of nine months. App. at 80. However, the court explicitly left sentencing open, pending receipt of information from counsel for Layman concerning where Layman wished the court to recommend that she be housed. *Id.* at 82. Counsel for Layman requested that the Court allow time to investigate and advise the Court. In response, the Court stated that it would not enter a sentencing order at that time. *Id.* at 83.

The court entered neither a final order nor a commitment order. On the following Tuesday, May 21, Layman filed a Motion for Home Detention asking the Court to allow the sentence to be served under home confinement. *Id.* at 85-86. The motion was limited to asking the court to

exercise its authority to designate home confinement pursuant to Sections 5B1.1(a)(2), 5C1.1(c)(3), and 5F1.2 of the Sentencing Guidelines. It was not filed pursuant to Rule 35 as the motion was not intended to correct arithmetical, technical or other clear error. The court then scheduled the continuation of the sentencing for May 30, 1996.

On May 30, 1996, the court initially explained that there had been "no imposition of sentence." App. at 92. The court then noted that the sentences had been imposed in the cases of the co-defendants, but that following May 17, the court expressly delayed imposition of sentence. *Id.* The court explained that the second hearing was a "continuation of the sentencing hearing on May 17." *Id.* at 93.

Further, counsel for Layman clarified that "previous to today Mrs. Layman had not asked the court yet to see the home confinement subsection... and that was the purpose for coming here. That had not been raised before." *Id.* The court acknowledged counsel's statement by agreeing, "Right." *Id.* at 94-5. Following argument from both counsel, the court sentenced defendant to nine months home detention "as a substitution for the imprisonment" plus an additional thirty-six (36) months of supervised release *Id.* at 99.

Later informed that such sentence must be a function of probation and prior to the entry of any order, on June 4, 1997, Layman was sentenced to thirty-six (36) months probation with the first nine months designated as home detention. The first and only sentencing order in this case, reflecting the June 4 sentence, was entered on June 5, 1997.

The United States appealed the court's decision. The court of appeals held that a sentence is imposed under Rule 35(c) when it is orally pronounced by the district court. Although raised in petitioner's brief, the Fourth Circuit neither addressed nor interpreted 18 U.S.C. § 3852(c). The court acknowledged that its ruling was at odds with the Seventh Circuit's decision in *United States v. Clay*, 37 F.3d 338 (7th Cir. 1994) which held that imposition of sentence

under Rule 35(c) refers to the entry of a judgment of conviction. App. at 62. The Fourth Circuit remanded the case to the district court with an order that the court impose the first pronouncement of sentence.

Layman petitioned for rehearing with a suggestion for rehearing en banc, but the petition was denied. App. at 47.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This case presents an important question on which the courts of appeal are divided, the context of which is relevant to district courts throughout the country. The issue affects the discretion a trial judge may exercise in determining the procedure and conduct of a sentencing and the ability of the judge to impose a sentence he or she determines is not only consistent with controlling statutory authority but is just and appropriate; this notwithstanding that it may amend a previously orally articulated description of disposition which was never imposed. This appeal calls for resolution of the competition between the sole written order consistent with a final oral articulation of sentence and an initial oral articulation of sentence inconsistent with the only written order of judgment.

I. THE FOURTH CIRCUIT DECISION CONFLICTS WITH STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 3582.

Historically, a general rule had been recognized that a trial court had the power to recall a defendant who had already been sentenced and to impose a different sentence from that originally imposed. *Bassett v. United States*, 76 U.S. (9 Wall.) 38 (1869); *United States v. Benz*, 282 U.S. 304, 306-07 (1931). This power was subject to the

limitation, grounded in the transfer of control from the judiciary to the executive branch, that a sentence could not be increased if a fine had been paid or if the defendant had commenced service of a term of imprisonment. *United States v. DiFrancesco*, 449 U.S. 117, 134 (1980).

A. The Legislative History of Section 3582 Upholds Retention of the Discretion Exercised by the Trial Court in This Case -- Discretion Now Being Eroded by Judicial Edict.

Sweeping legislative reform in 1984 imposed legislative constraints on the above-described judicial power. Congress enacted Section 3582 as part of the Sentencing Reform Act of 1984, Pub.L. No. 98-473, Title II, § 212(a)(2), 98 Stat. 1837, 1998. Section 3582(c) circumscribed the judicial power to revisit a previously imposed sentence, providing that:

> Modification of an imposed term of imprisonment.--The Court may not modify a term of imprisonment once it has been imposed except that--...

At what point a sentence "has been imposed" is the subject of this appeal and is without obvious answer. Curiously, the legislative history is silent as to the point at which the trial court relinquishes sentencing authority. After describing what it termed "safety valves" for later review, the Senate Report Commentary to section 3582(c) concludes that "[t]he approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentencing in particularly compelling situations." S.Rep. No. 225, 98th Cong., 2d Sess. 158 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3304.

The "later" review Congress was referring to was the accompanying Rule 35(b) provision which, when enacted in 1984, granted the trial court discretion to revisit and reduce the sentence within 120 days after imposition. While Congress has constricted that "later" power of review, no language has been adopted to restrict the judicial power over the manner or scheduling by which the defendant is sentenced. Absent an express legislative restriction of this power, courts should not restrict such judicial discretion.

Now, many appellate courts are reading this language expansively, not only to preclude later review, but in effect, to prematurely terminate a sentencing hearing upon initial articulation of a sentencing scheme and contrary to the judge's intent. Such an interpretation is not required by the statutory language and is clearly contrary to congressional intent to "[keep] the sentencing power in the judiciary where it belongs." In this appeal, petitioner argues that sentence had not been "imposed" for two reasons: (1) the court explicitly left sentencing open to receive additional information; and (2) an action is not after "sentence has been imposed" unless it occurs after entry of the written sentencing order.

B. The Context of Section 3582(c) and Related Provisions Support Petitioner's Interpretation -- The Fourth Circuit Decision Undermines a Coherent Sentencing Scheme.

The trial judge's decision to continue the sentencing pending receipt of information regarding prison facilities is directly encouraged by the Code. Section 3582(a) provides, as part of "[f]actors to be considered in imposing a term of imprisonment," the judge "shall consider any pertinent policy statements issued by the Sentencing Commission..." in determining "whether to make a recommendation concerning the type of prison facility appropriate for the

defendant." 18 U.S.C. § 3582(a). According to the legislative history, Section 3582 was designed to allow that "the judge may recommend a type of prison facility suitable for the defendant." Senate Comm. on Judiciary, Comprehensive Crime Control Act of 1984, S. Rep. No. 948-225, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.A.A.N. 3182, 3299.

Here, the court expressly had not entered any order, final or commitment. It did not yet have information necessary regarding what it would find as a suitable prison facility. As such, the trial court had not imposed sentence and expressly had not relinquished its power to sentence the defendant. If the Fourth Circuit's decision is allowed to stand, articulation of punishment will divest the Court of the ability to comply with the mandates of Section 3582(a). Technically, by articulating what the Fourth Circuit found to be a complete and enforceable sentence, the trial judge in this case no longer retained sentencing authority and was thus powerless to recommend a suitable facility as required by statute.

The Fourth Circuit's decision centers on holding that "imposition of sentence" occurs when the judge orally pronounces sentence, and the judge is thereafter barred from actions relating to sentencing unless explicitly authorized by rule or statute. Undeniably, the sentencing hearing and the oral pronouncement of sentence are part of the process of imposition of sentence. However, until written entry of the sentencing order, the trial judge retains sentencing authority over the defendant. *See United States v. Turner*, 998 F.2d 534, 536 (7th Cir. 1993), *cert. denied*, 510 U.S. 1026 (1993) (district judge's power to alter sentence expires from date judgment docketed). A sentence has not "been imposed" until entry of the written order.

Moreover, Congress did not choose one construct of imposition of sentence over the other. The strongest indicator of intent is found in the tense employed. Barring

action after sentence "has been imposed" implies a complete break from the imposition process. *See United States v. Wilson*, 503 U.S. 329 (1992) (holding tense of term "was imposed" in 18 U.S.C. § 3585(b) "is significant in construing statute.") Tellingly, the original judgment form, A 245 S, provided by the Administrative Office of the United states Courts and used throughout the federal system provides that "The sentence is imposed pursuant to the Sentencing Reform Act of 1984." *United States v. Ray*, 950 F.Supp. 363, 367 (D.D.C. 1996) (emphasis added).

The interpretation that sentence is not imposed until entry of the written order is further supported by a complete reading of section 3582 which also establishes the finality of the judgment. Subsection 3582(a) addresses the factors to be considered in imposing a term of imprisonment. Subsection 3582(b), entitled "Effect of Finality of Judgment," explains that a sentence constitutes a final judgment even though it may be modified under limited circumstances. Then, subsection 3582(c) lists those circumstances under which a term of imprisonment, once it has been imposed, may be modified. The chronological progression of Section 3582, which mandates a sentence is a final judgment before addressing modification of the sentenced, clearly assumes a sentence has not been imposed until all aspects of sentencing are completed.

Moreover, Section 3582 directly connects imposition of sentence with the finality of judgment. Subsection (b), entitled "Effect of Finality of Judgment" provides that "[n]otwithstanding the fact that a sentence to imprisonment can subsequently be (1) modified pursuant to the provisions of subsection (c)... a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes." 18 U.S.C. § 3582(b) (1996, as amended) (emphasis added).

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reading of section 3582 which also establishes the finality of the judgment. Subsection 3582(a) addresses the factors to be considered in imposing a term of imprisonment. Subsection 3582(b), entitled "Effect of Finality of Judgment," explains that a sentence constitutes a final judgment even though it may be modified under limited circumstances. Then, subsection 3582(c) lists those circumstances under which a term of imprisonment, once it has been imposed, may be modified. The chronological progression of Section 3582, which mandates a sentence is a final judgment before addressing modification of the sentenced, clearly assumes a sentence has not been imposed until all aspects of sentencing are completed.

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The reference to finality of judgment employs language used in determining when a party may exercise a right of appeal -- something that may not be done until after entry of the written judgment. *See* Fed.R.App.Proc. 4(b). The holdings of this Court make clear that written judgment must be entered for the judgment to be final:

> In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation... on the merits' and leaves nothing to be done but to enforce by execution what has been determined.

Berman v. United States, 302 U.S. 211, 213 (1927).

The language of Federal Rule of Appellate Procedure 4(b) further supports petitioner's interpretation. The Rule finds that a "notice of appeal filed after the announcement of a decision, sentence, or order--but before entry of the judgment or order--is treated as filed on the date of and after the entry." Fed.R.App.P. 4(b). The Commentary to subdivision (b) uses imposition of sentence and entry of judgment interchangeably noting that "in a criminal case, a post-trial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment." Commentary to Fed.R.App.P. 4(b); citing *United States v. Hashagen*, 816 F.2d 899, 902 n.5 (3rd Cir. 1987). This language represents the only attempt anywhere in the Code to define "imposition of sentence."

C. The Focus of the Fourth Circuit's Analysis was Misguided. Rule 35(c) Does Not Limit the Authority of the Trial Court.

The Fourth Circuit's analysis ignored Section 3582(c), limiting its analysis to whether the actions of the trial judge were authorized pursuant to Rule 35(c). However, the Fourth Circuit's focus on Rule 35 is misplaced as the instant actions of the defendant and the trial court were neither pursuant to nor governed by the Rule. Layman specifically stated that the motion for home detention was not filed pursuant to Rule 35(c). Further, Rule 35(c) prohibits nothing; it provides that:

> The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

Fed.R.Crim.P. 35(c). Rule 35(c) is merely one listed exception to the United States Code section limiting judicial action after a sentence has been imposed.

The present version of Rule 35(c) was adopted in 1991 and codified the decisions of the Second and Fourth Circuit recognizing an inherent power of the Court to correct a sentence imposed as a result of arithmetical, technical, or other clear error. *See United States v. Rico*, 902 F.2d 1065 (2nd Cir. 1990); *United States v. Cook*, 890 F.2d 672 (4th Cir. 1989). Rule 35(c)'s only restrictive nature is to limit the time for said correction to seven days after "imposition of sentence." While the calculation of the seven day time period requires determining when the seven days begins to run, Rule 35(c) was not enacted to define "imposition of sentence," nor does it purport to create any limitation until after the seven days has expired. Instead, Rule 35(c) merely incorporates the restriction in Section 3582(c) which limits trial court sentencing authority after sentence has been imposed.

Further, the Commentary to Rule 35(c) indicates that its framers envisioned the seven day time period to run from entry of the written order as it connects the time after imposition of sentence to the time for filing an appeal. "The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions..." Commentary to Fed.R.Crim.P. 35(c). Rule 35(c) limits judicial power after entry of the written order and thus does not implicate the court's actions in this case. *See Dorszynski v. United States*, 418 U.S. 424, 440 (1973) (holding Court "unwilling to ascribe to the Congress an intent to import, *sub silentio*, sentencing doctrine contrary to traditional powers of sentencing judges").

D. The Fourth Circuit's Decision Conflicts with the Holdings and Reasoning of the United States Supreme Court.

This Court has not directly addressed the basic question of the definition of imposition of sentence. However, this Court has many times addressed procedural questions surrounding the imposition of sentence with a unifying purpose of preventing rigid interpretations of the Rules from infringing on the rights of the accused.

In *Lemke v. United States*, 346 U.S. 325 (1953), this court examined a situation where a defendant filed an appeal after sentence was orally pronounced but before entry of written judgment. The *Lemke* Court accepted without dispute that judgment was final only after entry of the written judgment, but held that the notice of appeal was on file when judgment was entered, and, under such circumstances, a premature appeal is also a timely appeal. *Id.* at 325.

Earlier decisions of this Court clearly hold that imposition of sentence occurs upon written entry of judgment. In *Hill v. Wampler*, 298 U.S. 460 (1936), the Court wrote:

> The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the judgment. Two of the questions certified to us... make mention of a variance between the commitment and the sentence "orally pronounced." If that were the only variance, we should deem it unimportant. The only sentence known to law is the sentence or judgment entered upon the records of the court. If entry is inaccurate, there is a remedy

> by motion to correct it to the end that it may speak truth.

Id. at 464 (citations omitted). To the extent this Court has adopted such language and lower courts are not following said language, further confusion is created and more defendants are left without an expected remedy by relying on such language.

The reasoning employed by this court in *Corey v. United States*, 375 U.S. 169 (1963) was also telling. In *Corey*, this Court addressed the rights of appeal for a defendant committed by order to the custody of the Attorney General pending study of the appropriate sentence to be imposed pursuant to then 18 U.S.C. § 4208(b). The Court held that both the commitment order and the later alteration of sentence by the Attorney General were points at which appeal "must be taken promptly after sentence is imposed." *Id.* at 172.

Clearly, sentence is deemed imposed when it becomes a final enforceable judgment. The institution of punishment creates the finality warranting appeal, not mere oral articulation of sentence. As this Court deemed sentence imposed when the judgment becomes final, this Court has repeatedly held a judgment is final when it "leaves nothing to be done but to enforce by execution what has been determined." *Korematsu v. United States*, 319 U.S. 432, 435 (1942).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONGST THE CIRCUITS: WHETHER IMPOSITION OF SENTENCE CONCLUDES WITH ORAL PRONOUNCEMENT OR UPON ENTRY OF THE WRITTEN JUDGMENT.

Over the past six years, a significant split has developed among the circuits. Not only do the decisions conflict, but the reasoning employed by the circuits differs vastly, with far reaching implications.

To date, the First, Seventh, Eleventh, and D.C. Circuits have found that imposition of sentence is not complete until entry of the written judgment order. *United States v. Fahm,* 13 F.3d 447 (1st Cir. 1994); *United States v. Clay*, 37 F.3d 338 (7th Cir. 1994); *In re United States*, 898 F.2d 1485 (11th Cir. 1990); *United States v. Jordan*, 810 F.2d 262, 266 (D.C.Cir. 1987), *cert. denied*, 481 U.S. 1032 (1987).

Initially, the First Circuit in *Fahm* confined its analysis to Rule 35(c) looking to the judgment and docket entry which plainly reflected that sentence was "imposed" on the date of written entry. *Fahm* at 453. The court cited a previous First Circuit decision, *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993) which noted that imposition of sentence likely starts the clock running at the same time the period for filing a notice of appeal begins -- with entry of the judgment or order. The *Fahm* Court offered the initial justification that Federal Rule of Criminal Procedure 32(b)(1) requires that the judgment shall be signed and entered by the clerk.[1]

The Seventh Circuit, in the *Clay* decision, also cited *Morillo*, but further noted the 1993 advisory committee note

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[1] In *Fahm*, the District Court overruled defense counsel's motion to stay imposition of sentence, but allowed defense counsel to submit written opposition. The order was docketed the same day. Therefore, the distinction between oral pronouncement and written order was not material to the First Circuit's decision. However, the district court's election to conduct a second sentencing hearing almost three months later and amend its sentence illustrates the present widespread confusion regarding sentencing procedure.

to subdivision (b) of Federal Rule of Appellate Procedure 4 that "a post-trial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment." *United States v.* Clay, 37 F.3d at 340. This represents the only legislative attempt to define the point at which sentence is imposed, and the only circuit court to cite said definition to date.

The Eleventh Circuit, in its decision *In re U.S.*, addressed a vastly different factual situation. The defendant pled guilty to five counts of bank robbery. At sentencing, the court noted that each count related to a different bank robbery but all five counts were in the same indictment. The court stated that the government should have prepared five separate indictments. The court then proceeded to sentence defendant solely on count I of the indictment, orally articulating a sentence of twelve-years imprisonment on April 13, 1987.

Over one year later, the government moved to sentence the defendant on counts II through V. However, on July 26, 1989, the court dismissed those counts, holding the passage of time violated the defendant's sixth amendment right to a speedy sentencing. *In re U.S.*, 898 F.2d at 1486. The defendant then filed a motion under former Federal Rule of Criminal Procedure 35(b) to reduce his sentence to time served, said motion being granted by the court on August 22, 1989.[2]

The Eleventh Circuit upheld said motion as timely finding that "the rule clearly indicates that sentence is imposed when the sentencing order is an appealable final judgment." *Id.* at 1487. The court then explained that the

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[2] For offenses committed prior to November 1, 1987, Fed.R.Crim.P. 35(b) provided that "[a] motion to reduce sentence may be made, or the court may reduce sentence without motion, within 120 days after the sentence is imposed."

defendant must be sentenced on all counts, or the accounts must be otherwise disposed of, before sentence is imposed. While, arguably, a defendant has a right to appeal a sentence he is serving in spite of remaining outstanding counts, the Eleventh circuit formulation requires both written order and disposal of all charged counts before the trial relinquishes any sentencing control.

Finally, the D.C. Circuit court has adopted a completely different demarcation line for relinquishing sentencing authority. The *Jordan* court held that the district court:

> retains the power to recall the defendant and increase severity of sentence at any time before he begins to serve the sentence and *a fortiori* before he leaves the courthouse.

Jordan, supra, 810 F.2d 262, 266 n. 1. This decision was recently applied by the District Court of the District of Columbia to hold that the sentencing process continues while a defendant is still in the courthouse." *U.S. v. Harrington*, 741 F.Supp. 968 (D.D.C. 1990); *vacated on other grounds*, 947 F.2d 956 (D.C.Cir. 1991). Thus, in the District of Columbia, the defendant's sentencing fate may be determined as it initially was in *Harrington*, by whether a defendant chooses to forgo lunch and remain in the courthouse.

A. Three Circuits Have Defined Imposition of Sentence to Conclude with Oral Pronouncement of Sentence.

Joining the Fourth Circuit in holding that sentence has been imposed upon oral pronouncement are the Second and Tenth Circuits. *United States v. Abreau-Cabrera, 64 F.3d 67 (2nd Cir. 1995); United States v. Townsend*, 33 F.3d 1230 (10th Cir. 1994).

The *Abreau-Cabrera* Court initially noted that this issue "is an unresolved question that has created a split among the courts of appeals." 64 F.3d at 73. The Court then held that interpreting Rule 35(c) to refer to written judgment would allow courts to delay written entry to have "a change of heart" and alter the sentence --"a sequence of events we believe to be beyond what the rule was meant to allow." Divining this intent from the language and Commentary to Rule 35 ignores the function of Rule 35 as enumerated exception to a Code section limiting judicial power. Again Rule 35(c) is being transformed from a grant of judicial power to correct error to a limitation on judicial power.

Meanwhile, the Tenth Circuit determined entry of the written order to be purely a ministerial task, and found that sentence orally imposed governs a conflicting, later written sentence. *Townsend*, 33 F.3d at 1231.[3]

Finally, the Ninth Circuit, in essence, threw up its hands in frustration and left the question unanswered. *U.S. v. Navarro-Espinosa*, 30 F.3d 1169 (9th Cir. 1994). The facts in *Navarro-Espinosa* are virtually identical to these facts. The court orally articulated a sentence, but delayed formal entry of the sentence. The government then moved to correct

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[3] There remains an unreconciled split within the Tenth Circuit. In *U.S. v. Smith*, 929 F.2d 1453 (10th Cir. 1991), *cert. denied*, 502 U.S. 847 (1991), the court's oral pronouncement of sentence was "clear and unambiguous." However, upon increasing the sentence previously given, the district court held that jurisdiction to so act lay with the court by virtue of the court having not imposed sentence through entry of the written order. *Id.* at 1456. The Tenth Circuit upheld the exercise of the court's discretion and the sentence pronounced at the final sentencing hearing which occurred in excess of two months after the first. *Id.* at 1456-57. The Tenth Circuit decision is an anomaly in the fact that it failed to even mention Section 3582 or Rule 35, instead relying on the established judicial discretion reaffirmed in *DiFrancesco*. *Id.* Although *Townsend* failed to mention the *Smith* decision, Judge McKay authored both a concurrence in *Townsend* and the dissent in *Smith*.

defendant's sentence by adding conditions of probation. The district court added those conditions, and the defendant appealed arguing Rule 35(c) prohibited any amendment more than seven days after imposition of sentence.

The Ninth Circuit read the legislative history of Rule 35(c) to attempt to narrow the time for correction while noting the district court's conclusion that the language employed runs from seven days after the "formal entry of judgment." *Id.* at 1171. The Court then wrote:

> The interpretation of Rule 35 is a difficult issue, for while the intention of the drafters seems fairly clear, the language chosen does not further it. We hope that the Advisory Committee on Criminal Rules will be able to clarify this point.

Id. at 1171. The Ninth Circuit concluded that it did not need to resolve the Rule 35(c) issue holding that the district court was empowered to modify conditions of supervised release pursuant to 18 U.S.C. § 3583(e)(2) and Federal Rules of Criminal Procedure 32.1(b).

Technically, the Fourth Circuit's interpretation of Rule 35(c) as a codified restriction on modification of sentence creates an unresolvable conflict with 18 U.S.C. § 3583(e)(2) and Rule 32.1(b), prohibiting what those sections authorize. The *Abreau-Cabrera* analysis, defining Rule 35(c) as a limitation on judicial authority also creates this conflict.

B. A Split in Authority is Developing Within Specific Circuits.

Not only does a split exist between the circuits, but intra-circuit splits are developing as well. In additional to the split within the Tenth Circuit previously noted in

Footnote 3, *supra*, the developing Second Circuit jurisprudence reveals the mischief that results from a rigid interpretation of "imposition of sentence." The Second Circuit's decision in *Abreau-Cabrera*, relied upon by the Fourth Circuit, explicitly held sentence is "imposed" upon oral pronouncement. However, concurrent and subsequent decisions of the Second Circuit have abandoned that rationale.

In *United States v. Bonito*, 57 F.3d 167 (2nd Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 713 (1996), decided two months prior to *Abreau-Cabrera* and by an entirely different panel, the trial judge had orally pronounced sentence explicitly omitting any fine due to the defendant's seemingly dire financial situation. The government objected asserting the defendant's financial statement was false. The court continued the matter until a hearing 24 days later. At the second sentencing hearing, the defendant provided sufficient gambling slips to document his financial situation. However, the government argued the betting slips demonstrated that the defendant had been physically well enough to travel extensively to gamble. The court ultimately agreed and imposed no fine, but reversed its decision to depart downward based upon the defendant's medical condition. *Id.* at 176.

The defendant argued the district court was without power to alter the sentence as initially articulated at the first hearing. The Second Circuit disagreed holding that:

> at sentencing proceedings, discussion subsequent to an initial ruling may result in the court's modifying its initial pronouncement, all before its ruling becomes 'final.'... We see no reason for interpreting § 3582(c)'s use of "imposed" with undue rigidity, so as to lock a judge into an articulation of sentence based on

misinformation, or one sided information under these circumstances.

Id. at 176; citing *United States v. Carbone*, 739 F.2d 45, 47 (2nd Cir. 1984) (emphasis added). *Abreau-Cabrera* does not cite or refer to *Bonito*, nor does it define when oral pronouncement of sentence is completed.

Although *Bonito* pre-dated the *Abreau-Cabrera* decision, the split has continued post *Abreau-Cabrera*. In *U.S. v. Margiotti*, 85 F.3d 100 (2nd Cir. 1996), *cert. denied* ___ U.S. ___, 117 S.Ct. 324 (1996), the judge pronounced sentence before providing the defendant an opportunity to speak. After the defendant spoke, the judge then gave his reasons for adhering to the previously announced sentence. Instead of following the rigid definition of imposition of sentence articulated in *Abreau-Cabrera*, the *Margiotti* court rejected the defendant's appeal finding that "[i]n this instance, it is fair to say that the sentence was not *imposed* until after the defendant had spoken." *Id.* at 103 (emphasis in original). To give effect to the defendant's exercise of his right of allocution, the trial judge must have been empowered to impose a completely different sentence following allocution.

Finally, the Second Circuit recently revisited the imposition of sentence issue. In doing so, it perpetuated the internal inconsistency of the *Abreau-Cabrera* and *Bonito* decisions. In *United States v. DeMartino*, 112 F.3d 75 (2nd Cir. 1997), the court orally pronounced a sentence of "48 months, the sentence to run consecutive with the sentence the defendant is presently serving." On the same day, the judge signed a written judgment imposing a sentence of 63 months, 48 months of which was to run consecutively to the sentence he was currently serving. Three months later, the defendant was granted early parole for the prior sentence and appealed what had become a twelve month discrepancy between oral pronouncement and written judgment.

While the trial court claimed it was acting pursuant to Rule 35(c), the Second Circuit held said action was not authorized as the court was powerless to enter a written order which differed from the orally pronounced sentence. However, the Second Circuit noted that a sentence of 48 months would constitute a downward departure from the sentencing guidelines for which the court failed to provide its reasoning. The Second Circuit rejected the defendant's requested remedy of a written order embodying the orally pronounced sentence, and instead, exercised its discretion to remand for resentencing, placing the sole limitation that the judge articulate the reason for a downward departure, if any. *Id.* at 82.

In sum, the confusion surrounding imposition of sentence has created a quagmire of contradictory decisions in the Second Circuit. Such confusion is likely to be duplicated elsewhere, continuing the disturbing trend of incoherence in sentencing discretion.

C. The Basis for the Fourth Circuit's Opinion Involves a Split Amongst the Circuits as Regards the Purpose and Effect of the Written Order.

The Fourth Circuit's opinion is based on the determination that a written order merely memorializes the orally pronounced sentence. This holding raises a second fissure between the Circuits -- namely the effect of the written order. Technically, if the Second, Fourth, and Tenth Circuits are correct and imposition of sentence concludes with oral pronouncement, the written order can have no effect on the sentence.

However, the Tenth Circuit has held that "[w]hen an orally pronounced sentence is ambiguous, however, the judgment and commitment order is evidence which may be used to determine the intended sentence." *United States v. Villano*, 816 F.2d 1448, 1451 (10th Cir 1987). Thus, the

Tenth Circuit has held that the written order may influence the sentence ultimately served by the defendant.

Further, the language used by the Second Circuit in *Abreau-Cabrera* magnifies the division, as that court focused on the interest in "finality in sentencing" upon initial oral articulation of sentence. An emphasis on finality completely eviscerates any value that may be accorded the written judgment.

III. THIS CASE PRESENTS A LEGAL QUESTION OF SIGNIFICANT PUBLIC IMPORTANCE.

In a case such a this, where a defendant has plead guilty, sentencing is the most crucial juncture in the criminal process. Especially in drug cases, judicial fact determinations at sentencing can have a tremendous impact on the Guideline sentence by determining both weight and responsibility. Until the sentencing hearing, the judge has heard little evidence of guilt or upon which to fix punishment. The Seventh Circuit recently opined:

> It is well-known that the imposition of sentence is a critical stage of criminal proceedings, if not the most critical, particularly where the defendant has pleaded guilty.

United States v. Jackson, 32 F.3d 1101, 1105 (7th Cir. 1994) (citation omitted).

As the jury process encourages deliberate and informed decision making, so too should the judicial process encourage sentencing judges to make informed and well-reasoned decisions in determining sentence by protecting the long-standing and well established discretion of the trial court over the manner and procedure of sentencing.

A. A Rigid Definition of Imposition of Sentence Inhibits Reasoned Decision Making.

In this case, the judge delayed closure of the sentencing process to receive additional information pertaining to imposition of sentence, namely the most appropriate confinement facility. Before the sentencing process was completed, the judge further determined that he had not properly considered home confinement as a sentencing option, as required by statute, and then imposed a term of nine months home confinement.

A survey of chief justices in 1975 found that the reason most often given for supporting a requirement that judges articulate the reason for the pronounced sentence was that it would lead to "better thought-out sentences." *See* Korbakes, *Criminal Sentencing: Should the "Judge's Sound Discretion" be Explained?*, 59 Judicature 184, 191 (1975). A rigid definition of imposition of sentence hinders efforts to achieve a well-reasoned sentence.

While all decisions must become final, the interest in finality should not place an undue burden on achieving a well-reasoned and just result. The Second Circuit, post *Abreau-Cabrera*, further condemned a rigid definition of imposition of sentence which would deprive district court judges of the flexibility to correct oversights recognized during the sentencing process. The Court wrote:

> There is no reason to adopt so inflexible a rule. It would be especially inappropriate to do so at a time when district judges are already laboring under a sentencing regime that, by requiring intricate calculations and findings, necessarily complicates proceedings and increases the likelihood of technical mistakes. Sentencing is rigid and mechanistic

> enough as it is without the creation of rules that treat district judges as automatons.

Margiotti, 85 F.3d at 103.

By eliminating flexibility in conducting the sentencing proceeding, the Fourth Circuit has short-circuited the ability of either counsel to engage the court in a dialogue regarding the sentence articulated. This rigid structure would eliminate an efficient remedy where the court misconstrues evidence; fails to factor in certain evidence presented; or forgets specific sentencing options. While such issues could be raised on appeal, such instances would likely not constitute reversible error.

Moreover, under 18 U.S.C. § 3553(c), if a sentencing judge determines that the sentence must deviate from the appropriate guideline, the judge is required to thoroughly explains the reasons for the variance. While such an articulation builds a records for appellate review, it also forces the judge to "take a hard look at the relevant factors, and to focus on value judgments inherent in their sentencing decisions. *Dorszynski v. United States*, 418 U.S. 424, 457 (1973, Marshall, J., concurring). If the process of articulation immediately reveals flaws in the reasoning, the judge at that point should retain the power to appropriately modify his pronouncement.

Courting decisions that cannot stand up to inquiry from counsel erodes the well-established premise that a defendant has a right to be sentenced on the basis of accurate information. *United States v. Pless*, 982 F.2d 1118, 1129 (7th Cir. 1992). The defendant should be able to exercise that right by having an oral pronouncement corrected that, as articulated, is based upon a mistake of fact.

B. Rigid Definition of Imposition of Sentence Will Lead to Widespread Confusion and Procedural Inefficiency.

Initially, the Eleventh Circuit has noted that failure to start the Rule 35(c) clock and the time for filing a notice of appeal from the same point will lead to confusion and the unintentional loss of remedy in many cases. In the context of the previous Rule 35(b) which allowed a motion to reduce sentence "within 120 days after the sentence is imposed or probation is revoked," the Eleventh Circuit held that:

> The rule indicates that sentence is imposed when the sentencing order is an appealable final judgment. To reach a different conclusion, we would have to hold that there may be times when a sentence is imposed, a defendant is incarcerated, and the defendant must file his Rule 35(b) motion before he may appeal his sentence... Thus, sentence is imposed for the purposes of Rule 35(b) when the sentencing order constitutes a final, appealable order.

In re United States, 898 F.2d 1485 (11th Cir. 1990) (emphasis in original).

A rigid definition of imposition of sentence will prevent a judge from promptly remedying procedural mistakes, such as failure to allow the defendant to speak. Until now, many courts of appeal have allowed the "trial judge, realizing after sentencing that the right of allocution has been neglected, [to] rectify the situation by, in effect, setting aside the sentence, reopening the proceeding, and inviting the defendant to speak." *U.S. v. Barnes*, 948 F.2d 325, 329 (7th Cir. 1991) (citations omitted).

Moreover, if appeals courts such as the Second Circuit continue the trend of granting exceptions to Section 3582(c) on an ad hoc basis without consistent reasoning, more and more defendants will fall victim to assuming the judge retains sentencing authority throughout the sentencing process.

C. The Fourth Circuit's Decision Creates an Inevitable Conflict with the Guidelines Which Recognize the Interdependent Nature of Related Sentences and Will Encourage Inequity Between Co-Defendants.

When a defendant is convicted on more than one count, certain grouping rules apply in determining the offense level. United States Sentencing Commission, *Guidelines Manual*,§ 3D1.1 (Nov. 1996). Where a defendant has been convicted on one count of an indictment at an earlier time than conviction on other counts, courts have held that "logic requires § 3D1.1 be applied to all counts." *United States v. Kaufman*, 951 F.2d 793, 796 (7th Cir. 1992), *cert. denied*, 508 U.S. 913 (1993). However, the *Kaufman* court remedy of vacating the first sentence to sentence on all counts at once would not be possible if pronouncement of the first sentence immediately deprived the trial judge of sentencing jurisdiction.

Similarly, under 18 U.S.C. § 924(c), offense and underlying offense are interdependent and result in aggregate sentence, not sentences which may be treated distinctly. *United States v. Mendoza*, 118 F.3d 707, 710 (10th Cir. 1997), *cert. petition filed* Sept. 29, 1997 (No. 97-6202). A rigid definition of imposition of sentence prevents the judge from recognizing the interdependent nature and adjusting the first sentence articulated to create a coherent sentencing scheme. Where the trial court realized one of its sentences is erroneous, such a formal definition of imposition of sentence

could preclude adjustment of the entire sentencing package. *See U.S. v. Crowder*, 947 F.Supp. 1183, 1188 (E.D.Tenn. 1996) (noting that "nothing but 'pointless formalism'" would prevent the trial court from correcting an entire sentencing scheme "infested with error").

This same conflict of adjusting sentences with multiple counts also applies to instances where multiple co-defendants are convicted. The last co-defendant sentenced faces a judge with knowledge of all evidence from the previous sentencing hearings as well as all sentences articulated. The last defendant sentenced likely receives the most equitable sentence as the judge can evaluate the relative culpability of the defendants.[4] Without affording the court discretion to keep the earlier sentences open, the trial judge cannot guarantee equitable and just sentencing of all co-defendants. Without such equitable sentencing, the sentencing process easily becomes viewed as arbitrary, poorly thought out, and more concerned with form than substance.

D. Failure to Correct the Fourth Circuit's Decision Will Result in a Significant Deprivation of Liberty to the Defendant.

Finally, this case will determine whether the defendant receives credit for the nine months in home confinement which she has already served and which the trial judge, upon evaluation of sentencing alternatives, deemed just and appropriate, or whether she will serve nine months in prison. While perhaps not approaching the magnitude of

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[4] In this case, co-defendant Jay Smith had his sentence reduced after oral pronouncement and prior to written judgment so that he did not receive a longer sentence than a co-defendant viewed by the Court as at least as culpable. However, the government failed to timely appeal that sentence.

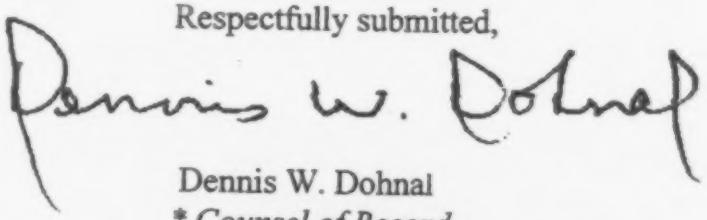
certain sentences before this Court, such a determination is of vital importance to the defendant, controlling whether or not this first time offender will be sent to prison and affecting her ability to manage her fledgling business, her opportunity to see her family, and her level of freedom.

In this case, Layman fell into a split zone authorizing imprisonment, home confinement, or a permutation of the two. While the sentencing process was continued and before entry of a written order, the trial judge determined that it was appropriate to specifically address the option of home confinement. Such an act is within the trial judge's sentencing discretion and should be upheld.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this Peitition for Writ of Certiorari.

Respectfully submitted,



Dennis W. Dohnal
* *Counsel of Record*
BRENNER, DOHNAL, EVANS
& YOFFY, P.C.
411 East Franklin Street
Suite 200
Post Office Box 470
Richmond, Virginia 23218-0470
(804) 644-1300

John E. Lichtenstein
Charles M. Smith, Jr.
LICHTENSTEIN & FISHWICK, P.L.C.
Liberty Trust Building

Suite 505
101 South Jefferson Street
P.O. Box 601
Roanoke, Virginia 24004-0601
(540) 343-9711

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In The
Supreme Court of the United States

October Term 1997

DAYNA R. PATRICK LAYMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

Dennis W. Dohnal*
Counsel of Record
BRENNER, DOHNAL, EVANS & YOFFY, P.C.
411 East Franklin Street
Suite 200
Richmond, VA 23218-0470
(804) 644-1300

John E. Lichtenstein
Charles M. Smith, Jr.
LICHTENSTEIN AND FISHWICK, P.L.C.
Liberty Trust Building, Suite 505
101 South Jefferson Street
Roanoke, Virginia 24011
(540) 343-9711

Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

DAYNA R. PATRICK LAYMAN,
Appellee.

UNITED STATES OF AMERICA,
Appellee,

v.

JOE BENNETT SMITH, III,
Appellant.

Record Nos. 96-4500, 96-4533

Argued May 6, 1997
Entered June 24, 1997

Appeals from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, District Judge. (CR-95-65-R)

Before WILKINSON, Chief Judge, WILKINS, Circuit Judge, and
TRAXLER, United States District Judge for the
District of South Carolina, sitting by designation.

Affirmed in part and vacated and remanded with instructions in part by published opinion. Judge Wilkins wrote the opinion, in which Chief Judge Wilkinson and Judge Traxler joined.

Joseph William Hooge Mott, Assistant United States Attorney, Roanoke, Virginia, for Appellant. John E. Lichtenstein, LICHTENSTEIN & FISHWICK, P.L.C., Roanoke, Virginia, for Appellee Layman; Jonathan M. Rogers, JONATHAN ROGERS, P.C., Roanoke, Virginia, for Appellee Smith. **ON BRIEF:** Robert P.Crouch, Jr., United States Attorney, Daniel Campbell, Third Year Law Intern, Roanoke, Virginia, for Appellant. Charles M. Smith, Jr., LICHTENSTEIN & FISHWICK, P.L.C., Roanoke, Virginia, for Appellee Layman.

OPINION OF THE COURT

WILKINS, Circuit Judge:

The United States appeals the sentence imposed on Dayna R. Patrick Layman following her plea of guilty to conspiracy to manufacture and to distribute marijuana, see 21 U.S.C.A. § 841(a)(1)(West1981), arguing that the district court improperly changed the sentence after it had been pronounced. Joe Bennett Smith, III cross-appeals his sentence, also imposed following a plea of guilty to conspiracy to manufacture and to distribute marijuana, see id., primarily contending that the district court incorrectly applied the 100-gram-per-plant equivalency ratio found in the Sentencing Guidelines because no marijuana plants were seized. See U.S. Sentencing Guidelines Manual § 2D1.1(c) (n.*(E)) (1995). We conclude that because the sentence was imposed on Layman when it was orally pronounced in open court, the district court lacked authority to alter the sentence absent "arithmetical, technical, or other clear error." See Fed. R. Crim. P.35(c). And, since the modification of Layman's sentence was not

prompted by any such error, we vacate the modified sentence and remand with instructions to impose the sentence as originally pronounced. Additionally, we hold that the equivalency ratio applies to any offense involving the cultivation of marijuana plants, regardless of whether live plants are actually seized. So, finding no error with respect to Smith's sentence, we affirm it.

I.

In 1988, Layman and her husband, Victor, approached George and Cheryl Fender with a plan to grow large quantities of high-quality marijuana in the area of Roanoke, Virginia. The responsibilities of the conspiracy would be divided: The Fenders would grow the marijuana in "grow houses" financed by Smith, while Victor would process and distribute the marijuana. Eventually, the conspiracy expanded to include other individuals who operated additional grow houses. The conspiracy continued until 1995 when the participants were indicted.

On May 17, 1996, a Friday, Layman appeared for sentencing. The district court determined that Layman's guideline range was 6-12 months and sentenced her to nine months imprisonment to be followed by a 36-month term of supervised release. No written order of conviction was filed at that time.

During the weekend, Layman and Victor each wrote a letter to the court requesting that it modify the sentence to place Layman in home detention. And, Layman subsequently filed a motion formally requesting such a sentence. The district court convened a hearing on the motion at which it made clear that it considered the proceedings to be a continuation of the May 17 hearing and that its oral pronouncement of sentence at that hearing did not constitute the "imposition of sentence" within the meaning of Rule 35(c). After hearing argument from the parties, the district court sentenced Layman to nine

months of home confinement and supervised release of 36 months, stating that it adhered to the previous sentence but was imposing home confinement as a substitute for imprisonment. On June 4, the district court conducted yet another sentencing hearing after the probation officer informed the court that the sentence imposed was not permitted by the guidelines.[1] At that hearing, the court sentenced Layman to 36 months probation, with nine months home detention as a condition of probation. See U.S.S.G. § 5C1.1(c)(3).

Smith's written guilty plea stipulated a drug quantity of between 40 and 120 kilograms of marijuana, with the precise amount to be determined by the district court at sentencing. Because there was no direct evidence available concerning the number of marijuana plants actually grown by the conspirators, the presentence report (PSR) employed a formula based on electrical bills to estimate the number of plants grown at the houses with which Smith was involved. The PSR then applied the 100-gram-per-plant equivalency ratio to arrive at a quantity of marijuana to be attributed to Smith. At sentencing, the district court observed that it was difficult to determine the precise amount of marijuana that should be attributed to Smith. Nevertheless, the court found Smith responsible for between 80 and 100 kilograms of the drug, noting that although the actual amount of marijuana was far greater than the amount stipulated in the plea agreement, it had "bent over backwards to give [Smith] the benefit of the doubt." J.A. 401. The district court sentenced Smith to 57 months imprisonment.

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[1] Pursuant to U.S.S.G. § 5C1.1(c)(2), the district court could have sentenced Layman to a term of supervised release including home detention, but only if at least one month of the sentence was satisfied by imprisonment

II.

The parties agree that the only question presented by Layman's appeal is whether the district court had authority to modify Layman's sentence after it had been pronounced during the May 17 hearing. Federal Rule of Criminal Procedure 35(c) allows a district court to alter a sentence only to "correct a sentence that was imposed as a result of arithmetical, technical, or other clear error" within seven days of the "imposition of sentence."[2] The authority of the district court to modify a sentence pursuant to Rule 35(c) is severely limited. See generally United States v. Abreu-Cabrera, 64 F.3d 67, 71 (2d Cir. 1995) (discussing the history of Rule 35(c)). The rule "is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence." Fed. R. Crim. P. 35 advisory committee's note; see also United States v. Cook, 890 F.2d 672, 675 (4th Cir. 1989) (noting that "[t]he power of a district court to amend a sentence does not extend to a situation where the district judge simply changes his mind").

The Government argues that sentence was imposed on Layman when the district court orally pronounced it during the May 17 hearing, so that any subsequent amendments to the sentence were restricted to the circumstances set forth in Rule 35(c). Further, the Government contends that the action of the district court in this case does not fall within the parameters of that rule. Layman responds that a sentence is not imposed until the court enters a written judgment and that until that time, the

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[2] It is undisputed that neither Rule 35(a), allowing a district court to modify a sentence on remand from the court of appeals, nor Rule 35(b), permitting amendment of a sentence pursuant to a motion by the Government within one year of the imposition of sentence, applies here. See Fed. R. Crim. P. 35(a), (b).

district court is free to manipulate the sentence as it sees fit. This is a legal issue subject to de novo review. See United States v. Blackwell, 81 F.3d 945, 947 (10th Cir. 1996).

Although we have not yet had occasion to rule on this question, the Second and Tenth Circuits have held that a sentence is imposed for purposes of Rule 35(c) when it is orally pronounced by the district court. See Abreu-Cabrera, 64 F.3d at 73-74; United States v. Townsend, 33 F.3d 1230, 1231 (10th Cir. 1994); see also United States v. Navarro-Espinosa, 30 F.3d 1169, 1170 (9th Cir. 1994) (noting that "the phrase `imposition of sentence' is a term of art that generally refers to the time at which a sentence is orally pronounced"). The Seventh Circuit, however, has reached a contrary conclusion, linking the imposition of sentence for purposes of Rule 35(c) to the entry of a judgment of conviction. See United States v. Clay, 37 F.3d 338, 340 (7th Cir. 1994).

We conclude that a sentence is imposed for purposes of Rule 35(c) when it is orally pronounced by the district court. As the Tenth Circuit reasoned in Townsend:

> It is well established that a sentence orally imposed governs a conflicting, later-written sentence of the court. This rule is grounded in the Sixth Amendment[,] which requires that a defendant be physically present at sentencing. When a judgment of conviction containing the sentence is officially entered of record, only members of the clerk's office are present. This cannot be what Congress meant in Rule 35(c) by "imposition of sentence" in light of the Sixth Amendment.

Townsend, 33 F.3d at 1231. Moreover, a rule that sentence is "imposed" when it is orally pronounced better promotes the goal of finality in sentencing. See Abreu-Cabrera, 64 F.3d at 74. Otherwise, a district court could

simply delay the ministerial task of filing a judgment, thereby providing the court an indefinite period of time in which to change its mind about the sentence. See id.; see also Cook, 890 F.2d at 674-75 (observing that the purpose of the amendments to Rule 35 "was to impose on the new sentencing system a requirement that the sentence imposed in the public forum during the sentencing hearing would remain constant, immune from later modification" (emphasis added)).

The district court orally pronounced Layman's sentence, and thus imposed it, during the May 17 hearing. At the conclusion of that hearing, all that remained to be done was the ministerial task of entering the judgment. Accordingly, Rule 35(c) governed the authority of the district court to amend Layman's sentence. The modification of Layman's sentence by the district court clearly was not for the purpose of correcting "arithmetical, technical, or other clear error" in sentencing, but rather was the product of a change of heart by the sentencing judge. Fed. R. Crim. P. 35(c). Therefore, we vacate Layman's sentence and remand with instructions to impose the sentence pronounced by the district court at the May 17 hearing.

III.

In his cross-appeal, Smith argues that the district court erred in determining the amount of marijuana attributable to him for sentencing purposes, principally contending that the court improperly applied the 100-gram-per-plant equivalency ratio of U.S.S.G.§ 2D1.1(c) (n.*(E)). Note *(E) instructs that "[i]n the case of an offense involving marijuana plants," the district court should apply the equivalency ratio unless the weight of the marijuana actually produced is greater. Id. Smith maintains that because the plants attributed to him had long since been harvested and the resulting marijuana distributed when the investigation of the conspiracy began, the offense was not one "involving marijuana plants." Thus, he contends,

the district court should not have determined drug quantity based on an application of the equivalency ratio to the number of plants involved in the offense, but rather on the actual amount of marijuana produced. The proper interpretation of § 2D1.1(c) (n.*(E)) is a legal issue, which we review de novo. See United States v. Jones, 31 F.3d 1304, 1315 (4th Cir. 1994).

The circuit courts of appeals are divided with respect to when an offense is one "involving marijuana plants" so that the equivalency ratio applies. See, e.g., United States v. Fletcher, 74 F.3d 49, 55 n.5 (4th Cir.), cert. denied, 117 S. Ct. 157 (1996). The Second Circuit Court of Appeals has concluded that the equivalency ratio should be applied only when live plants are seized. See United States v. Blume, 967 F.2d 45, 49-50 (2d Cir. 1992) (concluding that the district court erred in estimating the number of plants previously grown rather than basing drug quantity on testimony concerning the amount of marijuana actually produced). Most circuits, however, have concluded that when a defendant has been involved in the growing of marijuana for subsequent distribution, the offense is one "involving marijuana plants" and thus the equivalency ratio applies regardless of whether plants are seized. See United States v. Shields , 87 F.3d 1194, 1197 (11th Cir. 1996) (en banc) (ruling that, in case involving live plants and dead stalks, district court properly sentenced based on the total number of plants because "nothing in [§ 2D1.1(c) (n.*(E))] ... suggests that [its] application depends upon whether the marijuana plants are harvested before or after authorities apprehend the grower"); United States v. Wilson, 49 F.3d 406, 410 (8th Cir.) (holding that when a defendant participates "in the planting, cultivation, and harvesting of marijuana plants," the equivalency ratio applies even though "the marijuana ... was harvested, shucked, packaged, and sold many months before law enforcement personnel intervened"), cert. denied, 116 S. Ct. 384 (1995); United States v. Wegner, 46 F.3d 924, 927-28 (9th Cir. 1995)

(same); United States v. Haynes, 969 F.2d 569, 571-72 (7th Cir. 1992) (determining that drug quantity is properly based on the number of plants harvested if application of the equiva lency ratio results in a quantity of marijuana greater than the amount actually produced).

We agree with the majority of courts to have addressed this issue that the equivalency ratio of § 2D1.1(c) (n.*(E)) applies to all offenses involving the growing of marijuana, regardless of whether plants are seized. Thus, we conclude that the district court properly sentenced Smith by applying the equivalency ratio to the number of plants grown during his involvement in the conspiracy.

Smith also contends that the district court erred in its calculation of the number of plants for which he was responsible. Factual determinations by the district court are reviewed for clear error. See Jones, 31 F.3d at 1315. We conclude that the evidence more than adequately justifies the conclusion of the district court that Smith was responsible for at least 80 kilograms of marijuana, or 800 plants. The PSR sti-mated that Smith was responsible for at least 2,300 plants. Accordingly, we determine that the district court did not err in calculating the amount of marijuana attributable to Smith for sentencing purposes, and we affirm his sentence.

IV.

In sum, we hold that a sentence is imposed for purposes of Federal Rule Criminal Procedure 35(c) when it is orally pronounced by the district court. Subsequent to the oral pronouncement of sentence, Rule 35(c) allows alteration of the sentence only to correct "arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(c). Because the district court modified Layman's sentence after it had been imposed in open court, and because this modification does not fall within the parameters of Rule 35(c), we vacate Layman's sentence and remand with instructions to impose the sentence originally

pronounced. Additionally, we conclude that the district court properly applied the equivalency ratio of U.S.S.G. § 2D1.1(c) (n.*(E)) and did not otherwise err in its calculation of Smith's sentence. Accordingly, we affirm it.

AFFIRMED IN PART; VACATED AND REMANDED WITH INSTRUCTIONS IN PART

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 96-4500
CR-95-65-R

Entered: July 22, 1997

UNITED STATES OF AMERICA
Plaintiff - Appellant

v.

DAYNA R. PATRICK LAYMAN
Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
Clerk

AO245B (Rev. 3/95) Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

Western District of Virginia

UNITED STATES OF AMERICA

v.

DAYNA R. PATRICK LAYMAN

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number : **7:95CR00065-005**

John Lichtenstein, Esq.
Defendant's Attorney

THE DEFENDANT:

X Pleaded guilty to count(s) One (1)

Title & Section

21 U.S.C. 846

Nature of Offense

Conspiracy to Manufacture and Distribute Marijuana

Date Offense Concluded

06/23/1995

Count Number(s)

One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X Count(s) 5, 6, and 7

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 223-33-7538

Defendant's Date of Birth: 08/06/1967

Defendant's USM No.: 05630-084

Defendant's Residence of Address:

2733 McVitty Road
Roanoke, VA 24018

Defendant's Mailing Address:

2733 McVitty Road
Roanoke, VA 24018

Date of Imposition of Judgment

06/04/1996

/s/ James C. Turk
Signature of Judicial Officer

Honorable James C. Turk
United States District Judge
Name & Title of Judicial Officer

6/5/96
Date

DEFENDANT: **DAYNA R. PATRICK LAYMAN**

CASE NUMBER: **7:95CR00065-005**

PROBATION

The defendant is hereby placed on probation for a term of 36 month(s).

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable.)

DEFENDANT: **DAYNA R. PATRICK LAYMAN**

CASE NUMBER: **7:95CR00065-005**

SPECIAL CONDITIONS OF SUPERVISION

1. Defendant shall be on home detention with electronic monitoring for a period of nine (9) months beginning August 6, 1996.

2. Defendant shall pay for the cost of the electronic monitoring.

3. Defendant shall pay any special assessment that is imposed by this judgment.

4. Defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

5. Defendant shall reside in a residence free of firearms and destructive devices.

6. Defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of illegal controlled substances, firearms and destructive devices.

DEFENDANT: **DAYNA R. PATRICK LAYMAN**

CASE NUMBER: **7:95CR00065-005**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$50.00	$	$

DEFENDANT: **DAYNA R. PATRICK LAYMAN**

CASE NUMBER: **7:95CR00065-005**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. **X** in full immediately; or

X The defendant shall forfeit the defendant's interest in the following property to the United States:

SEE ATTACHED PRELIMINARY ORDER OF FORFEITURE DATED 5/17/96, PURSUANT TO COUNT TWELVE OF THE INDICTMENT AND PLEA AGREEMENT.

DEFENDANT: **DAYNA R. PATRICK LAYMAN**

CASE NUMBER: **7:95CR00065-005**

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

The defendant shall be held accountable for between 5 and 10 kilograms of marijuana.

Guideline Range Determined by Court:

Total Offense Level: **10**

Criminal History Category: **I**

Imprisonment Range: **6 to 12 months**

Supervised Release Range: **3 to 5 years**

Fine Range: **$2,000.00 to $1,000,000.00**

X Fine waived or below the guideline range because of inability to pay.

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no

reason to depart from the sentence called for by the application of the guidelines.

IMPRISONMENT 18 U.S.C. § 3582

§ 3582. Imposition of a sentence of imprisonment

(a) Factors to be considered in imposing a term of imprisonment. The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of finality of judgment. Notwithstanding the fact that a sentence to imprisonment can subsequently be--
(1) modified pursuant to the provisions of subsection (c);
(2) corrected pursuant to the provisions of rule 35 and section 3742; or
(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;
a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) Modification of an imposed term of imprisonment. The court may not modify a term of imprisonment once it has been imposed except that--
(1) in any case--

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that

such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that the applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

HISTORY; ANCILLARY AND DIRECTIVES

References in text:

"Rule 35", referred to in this section, is probably a reference to Rule 35 of USCS Rules of Criminal Procedure.

"The Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C 801 et seq.)", referred to in this section, is Act. Oct. 27, 1970, P. L. 91-513, 84 Stat. 1236, which appears generally as 21 USCS §§ 801 et seq. For full classification of such Act, consult USCS Tables volumes.

Effective date of section:

Act Oct. 12, 1984, P. L. 98-473, Title II, Ch II § 235(a)(1), 98 Stat. 2031, as amended, which appears as 18 USCS § 3551 note, provides that this section is effective on the first day of

the first calendar month beginning 36 months after enactment.

Amendments:
1988. Act Nov. 18, 1988, in subsec. (c)(2), substituted, "28 U.S.C, 994(o)" for "28 U.S.C. 994(n)".

Other provisions:
Application of section. For the provisions as to the application of this section, see Act. Oct. 12, 1984, P. L. 98-473, Title II, Ch II, § 235, 98 Stat. 2031, as amended, which appears as 18 USCS § 3551 note.

CROSS REFERENCES

This section is referred to in 28 USCS § 994.

RESEARCH GUIDE

Federal Procedure L Ed:
9 Fed Proc L Ed, Criminal Procedure §§ 22:924, 934.1, 967, 970.

INTERPRETIVE NOTES AND DECISIONS

Prisoner is denied sentence reduction under newly effective 18 USCS § 3582(c), where "almost unbelievably vicious criminal" now claiming to be "born again" seeks relief from 6 consecutive maximum sentences aggregating 50 years, because (1) jurisdiction to grant retroactive relief under § 3582(c) is questionable, (2) harsh sentence was validly imposed even under current sentencing guidelines, and (3) totality of prisoner's conduct requires that he spend in custody at least amount of time he will have to serve on

existing sentence before becoming eligible for parole. United States v. Deckard (1987, ND Ill) 675 F Supp 1127.

Used car dealer convicted of federal crimes is denied request under 18 USCS § 3582(c) for reduction of sentence based on purportedly lower sentencing range contained in new sentencing guidelines, where new guidelines are in context of unavailability of parole and legislative history cited by defendant - affects Parole Commission's consideration of guidelines only, because § 3582(c) was clearly intended to allow only modification of pre-guideline sentences. United States v. Abbenante (1988, DC RI) 681 F Supp. 126.

Forms:
7A Fed Procedural Forms L Ed, Criminal Procedure (1994) § 20:1050.

RIA Coordinators:
25 Fed Tax Coord 2d ¶ V-3606.

INTERPRETIVE NOTES AND DECISIONS

§ 3582. Imprisonment of a sentence of imprisonment

(a) [Unchanged]
(b) **Effect of finality of judgment.** Notwithstanding the fact that a sentence to imprisonment can subsequently be--

(1) [Unchanged]

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) [Unchanged]

[Concluding matter unchanged]
(c) Modification of an imposed term of imprisonment. The court may not modify a term of imprisonment once it has been imposed except that--

(1) in any case--

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau

of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g); and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) [Unchanged]

(2) [Unchanged]

(d) [Unchanged]

(As amended Nov. 29, 1990, P. L. 101-647, Title XXXV, § 3588, 104 Stat. 4930; Sept. 13, 1994, P.L. 103-322, Title VII, § 70002, 108 Stat. 1984; Oct. 11, 1996, P.L. 104-294, Title VI, § 604(b)(3), 110 Stat. 3506.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1990. Act. Nov. 29, 1990, in subsec. (b)(2), inserted "of the Federal Rules of Criminal Procedure".

1994. Act. Sept. 13, 1994, in subsec. (c)(1)(A), inserted a dash following "if it finds that", designated the matter beginning "extraordinary and compelling" as cl. (i), inserted a semicolon after "warrant such a reduction", and added cl. (ii).

1996. Act. Oct. 11, 1996 (effective on 9/13/94, pursuant to § 604(d) of such Act, which appears as 18 USCS § 13 note), in subsec. (c)(1)(A)(i), added "or" after the concluding semicolon.

RESEARCH GUIDE

Federal Procedure L Ed:

9A Fed Proc L Ed, Criminal Procedure §§ 22:1514, 1517,1518.

INTERPRETIVE NOTES AND DECISIONS

18 USCS § 3582(c)(2) providing that court may reduce term of imprisonment based on sentencing range that has subsequently been lowered by Sentencing Commission, applies only to offenses committed on or after effective date of Sentencing Guidelines, November 1, 1987. United States v. Watson (1989, CA5 Tex) 868 F2d 157.

Court could not under 18 USCS § 3582 sua sponte re-invoke its jurisdictional after nonguidelines sentence had become final in order to impose increased second sentence under sentencing guidelines, following Supreme Court decision upholding constitutionality of guidelines, where original journalized judgment made no reference to dual sentencing procedure. United States v. Martin (1990, CA6 Tenn) 913 F2d 1172. Rule that government's timely motion for reconsideration of sentence tolls running of appeal was not repealed by 18 USCS § 3582(c). United States v. Carr (1991, CA1 Mass) 932 F2d 67.

18 USCS § 3582(c)(2), which allows district court to reduce prison term if sentencing range has been subsequently lowered, did not give district court jurisdiction to review defendant's motion for modification of his sentence based on amendment to commentary to § 4B1.2, since amendment was not expressly designated to apply retroactively under § 1B1.10, notwithstanding fact that after district court denied defendant's motion, guidelines were amended to provide that amendment may be applied retroactively. United States v. Auman (1993, CA8 Minn) 8 F3d 1268.

Amendment to § 3E1.1 providing in certain cases for additional one-level reduction for acceptance of responsibility does not apply retroactively; § 1B1.10(d) does not include amendment in list of retroactive amendments and retroactive application is not authorized under 18 USCS § 3582(c)(2). United States v. Dowty (1993, CA8 SD) 996 F2d 937.

Amendment to § 3E1.1 allowing for three-level downward adjustment for acceptance of responsibility cannot be applied retroactively because it is not listed as covered under § 1B1.10, even though 18 USCS § 3582 empowers court to reduce term of imprisonment when sentencing range has been lowered. United States v. Avila (1993, CA10 Colo) 997 F2d 767.

District court had discretion under USCS § 3582 to resentence defendant under substantive amendment to structuring of bank accounts, § 2S1.3, which became effective while case was pending on appeal because amendment was expressly delineated in § 1B1.10(d) to have retroactive effect. United States v. Marcello (1994, CA3 Pa) 13 F3d 752.

Court did not possess authority under 18 USCS § 3582(c), which authorizes court to act pursuant to FRCrP 35, modify term of imprisonment two months after it was imposed, even though defendant had previously been granted downward departure for substantial assistance and thereafter refused to testify for government, since defendant did not meet requirements of Rule 35(c), which allows court acting within 7 days after imposition of sentence, to correct erroneous sentence, in that court did not act within time limit and no error within contemplation of Rule 35(c) occurred. United States v. Lopez (1994, CA5 Tex) 26 F3d 512.

Case would be remanded so that district court could address defendant's motion under § 3582(c)(2) to reduce prison term for conspiracy to manufacture amphetamine based on retroactive application of amendment to § 2D1.1, which provides that mixture or substance does not include materials that must be separated from controlled substance before controlled substance can be used where it was unclear whether defendant was sentenced based on 28.26 pounds of phenylacetone, or on 28.26 pounds of substance containing only 12.00 percent phenylacetone. United States v. Towe (1994 CA5 Tex) 26 F3d 614.

Defendant's motion for sentence reduction under 18 USCS § 3582 based on post-sentencing amendment to § 2D1.1, which provides that LSD weight is to be determined by assigning each does of LSD a weight of 0.4 milligrams, was properly denied even though court calculated defendant's sentence by including weight of blotter paper; court considered a number of factors under 18 USCS § 3553(a), as directed by 18
USCS § 3582, including defendant's post-amendment guideline range, and decided that due to defendant's personal and offense characteristics, defendant did not merit sentence reduction. United States v. Telman (1994, CA10 Kan) 28 F3d 94.

District Court had no power under 18 USCS § 3582 to reduce mandatory minimum sentence of defendant, which was determined using entire weight of LSD paper medium, on basis of amendment to § 2D1.1, which prescribed less stringent 0.4 milligram per-dose formula, since new approach did not override applicability of "mixture or substance for purpose of applying mandatory minimum sentence. United States v. Dimeo (1994, CA1 Me) 28 F3d 240.

Court did not abuse its discretion in determining after consideration of factors delineated in 18 USCS § 3553, not to reduce defendant's downward departure sentence further under 18 USCS § 3582 based on Amendment 484, which changed application note to § 2D1.1 by explaining that mixture or substance generally does not include materials that must be separated from controlled substance, and was made retroactive by § 1B1.10. United States v. Shaw (1994, CA5 Tex) 30 F3d 26 reh den (1994, CA5 Tex) 1994 US App LEXIS 27078.

Court properly denied defendant's motion for modification of his mandatory minimum sentence under 18 USCS § 3582 based on amendment to § 2D1.1, which incorporated new method for calculating quantity of LSD

and operated retrospectively pursuant to § 1B1.10, since policy statement to § 2D1.1(c) states that new approach does not override applicability of "mixture or substance" for purpose of applying any mandatory minimum and lead to inescapable conclusion that mandatory minimum overrides retroactive application of amendment. Pardue United States v. Pardue (1994, CA5 La) 36 F3d 429 (among conflicting authorities noted in United States v. Smith (1994, CA11 Ala) 39 F3d 1143, 8 FLW Fed C 883) and reh den United States v. Pardue (1994, CA5 La) US App LEXIS 34367 and petition for certiorari filed (Feb 10, 1995) and (criticized by United States v. Muschik (1995, CA9 Mont) 1995 US App LEXIS 3790).

Protection of public and rehabilitation were sufficient reasons under 18 USCS § 3553(c) for court's selecting sentence for 115 months from guideline range of 80 to 115 months for armed bank robbery and use of firearm during crime of violence; 18 USCS § 3582, which admonishes court to recognize that imprisonment is not appropriate means of promoting correction and rehabilitation in determining length of imprisonment, and 18 USCS 3553(a) includes correctional treatment as factor to be considered in determining sentence length. United States v. Duran (1994, CA9 Or) 37 F3d 557, 94 CDOS 7719, 94 Daily Journal DAR 14122.

Defendant's claim for reduction of sentence filed under 28 USCS § 2255 based on amendment to § 2D1.1(c), which adopted new method for calculating quantity of drugs, though not cognizable in § 2255 action because sentence was valid at time of imposition, would be treated by Court of Appeals as proceeding under 18 USCS 3582(c)(2), where defendant could have brought claim under § 3582, government had no objection, and hearing was held to determine reduction. United States v. Mimms (1995, CA5 Tex) 43 F3d 217.

Findings of fact made in proceeding under 18 USCS § 3582(c)(2) are reviewed under clearly erroneous standard. United States v. Mimms (1995, CA5 Tex) 43 F3d 217.

In deciding whether to resentence prisoner under 18 USCS § 3582(c)(2), court may consider testimony from other proceedings, but defendant must have notice that court is considering the testimony so that he will have opportunity to respond, and thus court abused its discretion by denying defendant's motion for reduction of sentence under 18 USCS § 3582(c)(2) without informing defendant that it intended to rely on testimony from codefendant's proceeding, notwithstanding fact that defendant was served with copy of transcript. United States v. Townsend (1995, CA5 Tex) 55 F3d 168.

Defendant's request for resentencing under amendment to career offender guidelines should have been made to district court, since power to reconsider sentence lies with district court under 18 USCS § 3582(c)(2). United States v. Jones (1995, CA7 Ill) 55 F3d 289, cert den (1995, US) 64 USLW 3244.

Denial of defendant's motion to reduce his sentence to 70 months pursuant to 18 USCS § 3582(c)(2) in light of amendment to § 2D1.1(c), which modified procedure for calculating quantity of LSD, was not abuse of discretion, despite defendant's claim that court should have reduced sentence to statutory minimum, where court gave due consideration to statutory minimum, where court gave due consideration to motion as whole, and implicitly to factors set forth in 18 USCS § 3553(a). United States v. Whitebird (1995, CA5 Miss) 55 F3d 1007.

Post-conviction motion to reduce sentence in light of amendment to guidelines under 18 USCS § 3582(c)(2) was not "arcillary matter" under 18 USCS § 3006A, and thus defendant had no statutory right to appointed counsel; 18 USCS § 3582(c)(2) motion is not second opportunity to present mitigating factors to sentencing judge, nor is it

challenge to appropriateness of original sentence, but rather, it is simply vehicle through which appropriately sentenced prisoners can urge court to exercise leniency to give certain defendants benefits of amendment to guidelines. United States v. Whitebird (1995, CA5 Miss) 55 F3d 1007.

Sentence was never "imposed" on defendant, and thus court was not prohibited under 18 USCS § 3582(c) from modifying it by refusing to grant departure it had initially granted based on defendant's health, where within single, uninterrupted proceeding, at which defendant was at all times present, initial sentence was articulated based on financial statement filed by defendant that prosecutor had not received fro review, prosecutor immediately indicated that he had contrary information, and court adjourned sentencing proceeding to allow further submissions. United States v. Bonito (1995, CA2 Conn) 57 F3d 167.

Court properly denied motion of defendant convicted of conspiracy to manufacture methamphetamine for reduction under 18 USCS § 3582(c)(2) pursuant to amendment to application note to § 2D1.1, which provided that mixture does not include materials that must be separated before controlled substance can be used, since capacity of laboratory provided separate, independent basis for sentencing, and amendment did not address situation in which sentence is based on size and capability of laboratory involved. United States v. Allison (1995, CA5 Tex) 63 F3d 350, cert den (1995, US) 133 L Ed 2d 324, 116 S Ct. 405.

Court's denial of 18 USCS § 3582 reduction was not abuse of discretion, despite defendant's claim that it was unclear whether methamphetamine was d-methamphetamine or l-methampheramine, since based on unrebutted testimony that methamphetamine laboratory had capacity to produce 10 pounds of dl-methamphetamine, which necessarily includes 5 pounds of d-methamphetamine, defendant would receive mandatory minimum sentence of 240 months, the same sentence he originally received. United States v. Allison

(1995, CA5 Tex) 63 F3d 350, cert den (1995, US) 133 L Ed 2d 324, 116 S Ct 405.

Even though district court lacked jurisdiction to resentence defendant based on retroactive amendment to guidelines pursuant to defendant's pro se motion under 28 USCS § 2255, Court of Appeals would construe motion as request for resentencing under 18 USCS § 3582. Hamilton v. United States (1995, CA9 Cal) 67 F3d 761, 95 CDOS 6984, 95 Daily Journal DAR 11978.

Amendment 459 to 3E1.1 does not apply retroactively pursuant to 18 USCS § 3582 to allow third level of reduction, since § 1B1.10 does not list amendment 459 as one that applies retroactively. United States v. Thompson (1995, CA3 NJ) 70 F3d 279.

Defendant sentenced under 1989 guidelines as career offender based on his conviction for being felon in possession of firearm was not eligible for sentencing reduction based on 1991 amendment, which would have precluded sentencing him as career offender, since amendment was enacted prior to defendant's sentencing, and under § 3582 and § 1B1.10 he did not meet threshold qualification of having been sentenced "based on a sentencing range that has subsequently been lowered." United States v. Lykes (1995, CA7 Ill) 73 F3d 140.

Court of Appeals lacked jurisdiction over district court's order denying defendant's 18 USCS § 3582(c)(2) motion to reduce term of his imprisonment, since FRAP 4(b) applies to appeal from denial of § 3582(c)(2) motion and defendant's appeal was filed more than ten days after entry of court's order, and case would be remanded to district court to determine whether time for filing notice of appeal should be extended. United States v. Petty (1996, CA8 Ark) 82 F3d 809.

Refusal of district court to modify, under 18 USCS § 3582, defendant's sentence for offenses involving liquid mixture containing P2P, in light of amendment 484 to §

2D1.1, which provides that mixture or substance does not include materials that must be separated from controlled substance, was not abuse of discretion, where court considered relevant 18 USCS § 3553(a) factors; court noted that case involved clandestine laboratory engaged in manufacturing amphetamines and that guidelines take into account percentage of waste in P2P, as evidenced by sizable decrease in drug equivalency ratios, and recalculation of defendant's sentence in accordance with amendment resulted in same offense level. United States v. Dorrough (1996, CA10 Okla) 84 F3d 1309.

Case would be remanded to permit district court to consider whether defendant's sentence should be reduced pursuant to 18 USCS § 3582 based on amendment to § 2D1.1(c), reducing quantity of marijuana attributable to marijuana plant. United States v Risch (1996, CA8 Mo) 87 F3d 240.

Post-sentencing amendment to § 1B1.3 cannot be given retroactive effect in context of 18 USCS § 3582(c)(2) motion for modification of sentence, despite defendant's claim that amendment merely clarified § 1B1.3, since eligibility of consideration under § 3582 is triggered only by amendment listed in subsection (c) of § 1B1.10, and amendment to § 1B1.3 is not listed in § 1B1.10. United States v Drath (1996, CA5 Tex) 89 F3d 216.

Petitioner's sentence is reduced from 66 to 41 months pursuant to 18 USCS § 3582(c)(2), where her offense level for failing to file currency report was affected by sizable separate increases because she (1) reasonably should have believed funds were criminally derived property, and (2) knew or believed that funds were criminally derived property, even though guideline § 2S1.3 was modified about 3 months after her sentencing to change drastically treatment given her knowledge, because new treatment imposes clearer and more sensible standard and amendment is enumerated in § 3582 as one to be considered for retroactive application.

Rodriguez-Alonso v United States (1992, ED NY) 807 F Supp 21.

Cocaine distributor's sentence will not be reduced, even though sentencing guidelines amendment enacted after distributor was sentenced § 3E1.1(b) would give him additional one-level decrease for acceptance of responsibility, because administrative policy considerations and 18 USCS § 3582(c) language lead to conclusion that distributor does not have right to benefit from amendment which took effect only after court had imposed otherwise lawful sentence. United States v Rios-Paz (1992, ED NY) 808 F Supp 206.

Cocaine distributor's motion for modification of sentence must be denied, even though modification of § 3E1.1 took effect only 5 months after his sentencing and allows additional level reduction for acceptance of responsibility, where that modification is not included in § 1B1.10(d), because § 1B1.10(a) is binding on court and permits sentence modification under 18 USCS § 3582(c)(2) only for amendments listed in § 1B1.10(d). United States v Guerra (1993, ND Tex) 809 F Supp 480.

Illegal alien cocaine trafficker is denied reduction of his 57-month prison term, even though trafficker pleaded guilty and amendment to § 3E1.1 allows 3-level reduction for acceptance of responsibility instead of previous 2-level reduction limit, because absence of this amendment from list at § 1B1.10(d) indicates retroactive application is not appropriate to justify reduction under 18 USCS § 3582(c)(2). United States v Solis-Solis (1993, DC Kan) 810 F Supp 1231.

Bank robber's postconviction motion for further reduction of sentence for acceptance of responsibility must be denied, where robber contends that his guideline range was subsequently lowered by Sentencing Commission when it amended § 3E1.1 to allow up to 3-point reduction for acceptance of responsibility, because explicit language of 18

USCS § 3582(c)(2) and Commission's policy statement contained in § 1B1.10 of guidelines compel court to deny request for modification of sentence through retroactive application of Amendment 459. United States v. Pustol (1993, ED Wash) 812 F Supp 1092.

Prisoner who received sentence under U.S. sentencing guidelines is not entitled to additional reduction in sentence based on acceptance of responsibility, which became mitigating factor by amendment to sentencing guideline which took effect after his sentencing, because Sentencing Commission Policy Statement provides that additional reduction for acceptance of responsibility is not retroactive under U.S. Sentencing Guideline § 1B1.10(d). United States v Avalos (1993, DC Colo) 817 F Supp 894.

Amendment 459 to sentencing guidelines could not be retroactively applied to reduce sentence, where amendment would allow additional one-level reduction for acceptance of responsibility, because 18 USCS § 3582(c) did not provide for retroactive application of amendment 459, and Commission could not have foreseen retroactive application of amendment. United States v Torres-Gonzalez (1993, DC Puerto Rico) 834 F Supp 550.

LSD convict is granted sentence reduction of only one month, even though retroactive amendment to sentencing guidelines dealing with LSD-related offenses appears to drop his range to between 51 and 63 months, because binding FRCrP 11(e)(1)(c) plea agreement still requires custodial sentence of at least 60 months so that only relief court is empowered to grant is minuscule reduction from 61 to 60 months. United States v Dudek (1994, ND Ill) 867 F Supp 766.

Rule 35. Correction or Reduction of Sentence

(c) Correction of Sentence by Sentencing Court. The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

(As amended Feb. 28, 1996, eff. July 1, 1996; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, Pub.L. 98–473, Title II, § 215(b), 98 Stat. 2015; Apr. 29, 1985, eff. Aug. 1, 1985; Oct. 27, 1986, Pub.L. 99–570, Title X, § 1009, 100 Stat. 3207-8; Apr. 30, 1991, eff. Dec. 1, 1991.)

1991 Amendment

Rule 35(b), as amended in 1987 as part of the Sentencing Reform Act of 1984, reflects a method by which the government may obtain valuable assistance from defendants in return for an agreement to file a motion to reduce the sentence, even if the reduction would reduce the sentence below the mandatory minimum sentence.

The title of subsection (b) has been amendment to reflect that there is a difference between correcting an illegal or improper sentence, as in subsection (a), and reducing an otherwise legal sentence for special reasons under subsection (b).

Under the 1987 amendment, the trial court was required to rule on the government's motion to reduce a defendant's sentence within one year after imposition of the sentence. This caused problems, however, in situations where the defendant's assistance could not be fully assessed in time to make a timely motion which could not be ruled upon before one year had elapsed. The amendment requires the government to make its motion to reduce the sentence before one year has elapsed but does not require the court to

rule on the motion within the one year limit. This change should benefit both the government and the defendant and will permit completion of the defendant's anticipated cooperation with the government. Although no specific time limit is set on the court's ruling on the motion to reduce the sentence, the burden nonetheless rests on the government to request and justify a delay in the court's ruling.

The amendment also recognizes that there may be those cases where the defendant's assistance or cooperation may not occur until after one year has elapsed. For example, the defendant may not have obtained information useful to the government until after the time limit had passed. In those instances the trial court in its discretion may consider what would otherwise be an untimely motion if the government establishes that the cooperation could not have been furnished within the one-year time limit. In deciding whether to consider an untimely motion, the court may, for example, consider whether the assistance was provided as early as possible.

Subdivision (c) is intended to adopt, in part, a suggestion from the Federal Courts Study Committee 1990 that Rule 35 be amended to recognize explicitly the ability of the sentencing court to correct a sentence imposed as a result of an obvious arithmetical, technical or other clear error, if the error is discovered shortly after the sentence is imposed. At least two courts of appeals have held that the trial court has the inherent authority, notwithstanding the repeal of former Rule 35(a) by the Sentencing Reform Act of 1984, to correct a sentence within the time allowed for sentence appeal by any party under 18 U.S.C. 3742. *See United States v. Cook*, 890 F.2d 672 (4th Cir.1989) (error in applying sentencing guidelines); *United States v. Rico*, 902 F.2d 1065 (2nd Cir. 1990) (failure to impose prison sentence required by terms of plea agreement). The amendment in effect codifies the result in those two cases but provides a more stringent time requirement. The Committee believed that the

time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence. A shorter period of time would also reduce the likelihood of abuse of the rule by limiting its application to acknowledged and obvious errors in sentencing.

The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines. Furthermore, the Committee did not intend that the rule relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing. *See, e.g., United States v. Jones*, 899 F.2d 1097 (11th Cir.1990)

The subdivision does not provide for any formalized method of bringing the error to the attention of the court and recognizes that the court could *sua sponte* make the correction. Although the amendment does not expressly address the issue of advance notice to the parties or whether the defendant should be present in court for resentencing, the Committee contemplates that the court will act in accordance with Rules 32 and 43 with regard to any corrections in the sentence. *Compare United States v. Cook, supra* (court erred in correcting sentence *sua sponte* in absence of defendant) with *United States v. Rico, supra* (court heard arguments on

request by government to correct sentence). The Committee contemplates that the court would enter an order correcting the sentence and that such order must be entered within the seven (7) day period so that the appellate process (if a timely appeal is taken) may proceed without delay and without jurisdictional confusion.

Rule 35(c) provides an efficient and prompt method for correcting obvious technical errors that are called to the court's attention immediately after sentencing. But the addition of this subdivision is not intended to preclude a defendant from obtaining statutory relief from a plainly illegal sentence. The Committee's assumption is that a defendant detained pursuant to such a sentence could seek relief under 28 U.S.C. § 2255 if the seven day period provided in Rule 35(c) has elapsed. Rule 35(c) and § 2255 should thus provide sufficient authority for a district court to correct obvious sentencing errors.

The Committee considered, but rejected, a proposal from the Federal Courts Study Committee to permit modification of a sentence, within 120 days of sentencing, based upon new factual information not known to the defendant at the time of sentencing. Unlike the proposed subdivision (c) which addresses obvious technical mistakes, the ability of the defendant (and perhaps the government) to come forward with new evidence would be a significant step toward returning Rule 35 to its former state. The Committee believed that such a change would inject into Rule 35 a degree of post-sentencing discretion which would raise doubts about the finality of determinate sentencing that Congress attempted to resolve by eliminating former Rule 35(a). It would also tend to confuse the jurisdiction of the courts of appeals in those cases in which a timely appeal is taken with respect to the sentence. Finally, the Committee was not persuaded by the available evidence that a problem of sufficient magnitude existed at this time which would warrant such an amendment.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION

THE UNITED STATES OF AMERICA,
PLAINTIFF,

vs.

DAYNA R. PATRICK LAYMAN,
DEFENDANT.

CRIMINAL DOCKET NO. #95-CR-65

BEFORE: THE HONORABLE JAMES C. TURK,
DISTRICT JUDGE

EXCERPTS FROM SENTENCING

ROANOKE, VIRGINIA
MAY 17, 1996

STENOGRAPHIC REPORT OF EXCERPTS FROM THE SENTENCING HELD IN THE CASE OF THE UNITED STATES OF AMERICA, PLAINTIFF, VERSUS DAYNA R. PATRICK LAYMAN, DEFENDANT, CRIMINAL ACTION #95-CR-65, IN ROANOKE, VIRGINIA ON MAY 17, 1996, AS HEARD BEFORE THE HONORABLE JAMES C. TURK, DISTRICT JUDGE.

APPEARANCES:

JOSEPH MOTT, Esq.
ASSISTANT UNITED STATES ATTORNEY
P.O. BOX 1709
ROANOKE, VIRGINIA 24008

COUNSEL FOR THE GOVERNMENT

JOHN E. LICHTENSTEIN, Esq.
P.O. BOX 601
ROANOKE, VIRGINIA 24004-0601

COUNSEL FOR THE DEFENDANT

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...as to her involvement, really, she should be attributable for all three (3) of those grow houses. And it's, you know, I just hate that she can't come in and not call George and Cheryl Fender liars and not call Catherine Sullivan a liar and, you know, make up the story about Rob Shephard and the signature and all that. I think the court could be a lot more comfortable about it and certainly the government would be as well. But that's, you know, I don't know what else to point to other than the forensic evidence in the case as to what her actual involvement in the conspiracy was.

THE COURT: Anything you want to say in response?

MR. LICHTENSTEIN: Very briefly, Mr. Mott is arguing that she's there and she had to be involved. She's just too close to it, that she was in the properties. And Your Honor, the only thing I want to say ---

THE COURT: Well, she has pled guilty to being in the conspiracy.

MR. LICHTENSTEIN: That is what I was going to say.

THE COURT: And you can be a part of, you know, a marijuana conspiracy without touching a plant or anything like that.

MR. LICHTENSTEIN: Yes, sir. Judge, the only thing I did want to point out is that it strikes Mr. Mott as unbelievable perhaps, but it is also supported by extrinsic evidence of the lack of any witness who comes in and says she

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...accountable for. Maybe, you know, he has a better technique of presenting --- I was more impressed with Victor's testimony yesterday than I was yours. I'm not saying you weren't being as truthful as you know how. But I'm going to give you the benefit of every doubt and I make the factual finding that you are accountable for at least five (5) but no more than ten (10) kilograms of marijuana. And I believe that gives you a base offense level of fourteen (14). And we're giving you two (2) points for being a minor participant and that gives you under the guidelines an adjusted offense level of twelve (12) and I'm giving you two (2) points for acceptance of responsibility and that gives you a total offense level under the guidelines of ten (10) and you have a criminal history category of one (1) and I believe that calls for a period of incarceration of from six (6) to twelve (12) months.

Based on --- And let me say this before, you know, it concerns the court that --- the disparity of sentences that take place. One of the first cases I dealt with was a young black man from Wytheville on a habeas matter and he had possessed less than two and a half (2½) ounces of marijuana. He was convicted of possession with intent to distribute and he was given forty (40) years to serve and a fine of either twenty thousand (20,000) or forty thousand (40,000). I don't know, I can't remember now. But for that small amount. So, you know, the sentences range all over the scale.

Based on all of that it's the judgment of the court that you be committed to the custody of the Bureau of Prisons to be imprisoned for a period of nine (9) months. Upon release from incarceration you'll be placed on supervised release for a period of thirty-six (36) months. So within seventy-two (72) hours of release from the custody of the Bureau of Prisons you will report in person to the probation office in the district to which you are released. While you are on supervised release you cannot commit any federal, state or local crime, you cannot possess or use any illegally controlled substance and you'll be required to comply with the standard conditions of supervised release.

In addition to the standard conditions I'm going to impose the following special conditions. You'll be required to participate in such program of testing and treatment for substance abuse as directed by the supervising officer until such time as you are released from the program by the supervising officer. Since you are a convicted felon you can not possess or own a firearm, but while you're on supervised release you must live in a residence free form where any firearms or other destructive devices are kept. You'll be required to submit to such warrantless searches and seizures of your person and property as directed by the supervising officer to determine whether you're in possession of any illegal controlled substance or firearms or other destructive

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device.

I find that since the forfeitures and so forth have taken place you do not have ability to pay a fine. I'm going

to waive that in this instance. I find that you do not have the cost to pay for your confinement and I'm going to waive that and I don't think you'll have funds to pay for the cost of your supervised release so I'm going to waive that. There is a special mandatory assessment of fifty dollars ($50.00) which is due and payable and which the court does not have authority to waive.

Where would she like for the court to recommend that she be housed? Is there any facility other than Alderson?

MR. PRICE: Alderson would be the closest facility.

THE COURT: I know it would be the closest. Do they have a camp facility there?

MR. PRICE: Alderson is a camp.

THE COURT: Have they done away with the medium security and so forth? Is it all a camp now?

MR. PRICE: Yes, sir.

THE COURT: It is?

MR. LICHTENSTEIN: Your honor, would the court --- I think that's probably going to be our response, but would the court allow time for us to investigate that and perhaps on Monday morning to advise the court of our position? It is

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our --- The reason for the request, Your Honor, is we just do not --- I know that it is now a camp, but I don't know what else ---

THE COURT: I didn't know it was solely a camp now. I've been there, you know, when it was medium and maximum security and it wasn't a nice place.

MR. LICHTENSTEIN: That's why I'd like to be able if the court please, just be able to check that. I don't know ---

THE COURT: But a camp facility you're not behind bars or anything. You know, you're out and --- The camp facilities are sort of like --- I know it sounds sort of trite, but sort of like college campuses, the camps that I have visited.

MR. LICHTENSTEIN: Would the court consider making for the record a finding that a camp would be appropriate and that ---

THE COURT: I'll recommend that she be housed in a camp facility.

MR. LICHTENSTEIN: And then perhaps counsel can come back to the court very quickly ---

THE COURT: All right. We won't get the order out anyway until --- Just let me know where you would like for the court to recommend that she be --- And does she want some time before she goes?

MS. LAYMAN: Yes, sir, Your Honor.

THE COURT: I'll have her report the same day as your

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... as well as a personal computer which was not related nor ever a part of this.

MR. MOTT: Judge, there's an Acer Acrow (phonetic) computer which is being forfeited pursuant to the plea agreement.

MR. LICHTENSTEIN: Your Honor, if the personal property could just be found to be appropriate to be ---

THE COURT: I think she can probably go by and --- I believe they can work that out. I believe so. All right, and we're going to leave you free --- we'll direct that you report to the facility designated by the Bureau of Prison on August 5th by twelve o'clock (12:00) noon and we'll leave you free

on the bond that you're now on until that time. All right. Ask the clerk to please call the next matter.

(Proceeding is concluded)

CERTIFICATE

I, Clara L. Whitlock, Official Court Reporter for the United States District Court for the Western District of Virginia, Roanoke Division, hereby certify that the foregoing is a true, accurate and complete transcript of excerpts from the sentencing held in the case of The United States of America, Plaintiff, versus Dayna R. Patrick Layman, Defendant, Criminal Action #95-CP-65, in Roanoke, Virginia on May 17, 1996, as heard before the Honorable James C. Turk, District Judge.

_____Clara L. Whitlock____
OFFICIAL COURT REPORTER

_____6 - 7 - 96_____
DATE

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA
V.
DAYNA M. PATRICK LAYMAN

Criminal No. 95-65

MOTION FOR HOME DETENTION

COMES NOW the Defendant, Dayna R. Patrick Layman, by counsel, and respectfully moves this Court to authorize a period of home detention under Sections 5B1.1(a)(2), 5C1.1(c)(3), 5F1.2 of the 1995 Sentencing Guidelines. In support of this motion, defendant states as follows:

1. Defendant Dayna R. Patrick Layman pleaded guilty to Conspiracy to Manufacture and Distribute marijuana and was sentenced by this Court to nine months imprisonment.

2. Defendant here simply requests the Court designate defendant's sentence be served in home confinement.

3. Testimony identified defendant's role in the offense, at most, as tasks performed at the direction of others. (See also attached letters from defendant and Victor Layman, defendant's husband).

4. The Court's finding acknowledges defendant's "minor" role as agreed to by the government in the instant Plea Agreement.

5. Pursuant to Section 5F1.2, home detention may be imposed as a substitute for imprisonment pursuant to Base Offense Level 10, Zone B.

6. Prior to investigation and arrest, defendant has placed extensive resources toward the establishment of a business by which to support herself during her husband's significantly longer incarceration.

7. Given her complete lack of criminal record and the extension and varied costs to the defendant from this investigation, conviction, and sentencing, society's interests in deterrence, retribution, and rehabilitation would best be served through a sentence of home detention and as such would serve the interests of justice.

WHEREFORE, Dayna R. Patrick Layman respectfully moves this Court to impose and sentence of nine months home detention.

DAYNA R. PATRICK LAYMAN

BY _____
Of Counsel

John E. Lichtenstein
Attorney At Law
Liberty First Building
Suite 505
101 South Jefferson Street
PO Box 2016
Roanoke, Virginia 24009-2016
(703) 343-9711
Virginia State Bar #27048

CERTIFICATE OF SERVICE

I hereby certify that I have mailed postage pre-paid a true and correct copy of the foregoing Motion for Home Detention this 21st day of May, 1996:

Joseph H. Mott, Esquire
Assistant United States Attorney
PO Box 1791
Roanoke, Virginia 24008-1709

Jonathan Rogers, Esquire
PO Box 2886
Roanoke, Virginia 240011-2886

Thomas M. Blaylock, Esquire
PO Box 134
Roanoke, Virginia 24002

Jeffrey D. Rudd, Esquire
PO Box 862
Roanoke, Virginia 24005

Rhonda L. Overstreet, Esquire
PO Box 2319
Roanoke, Virginia 24010-2319

Anthony F. Anderson, Esquire
PO Box 1525
Roanoke, Virginia 24007

Kirk A. Ludwig, Esquire
Martin, Hopkins and Lemon
PO Box 13366
Roanoke, Virginia 24033-3366

John Gregory, Jr., Esquire
103 S. College Avenue
Salem, Virginia 24153

Robert F. Rider, Esquire
Rider, Thomas Cleveland, Ferris & Eakin
22 Luck Avenue, S.W.
PO Box 1791
Roanoke, Virginia 24008-1791

John B. Lichtenstein

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

THE UNITED STATES OF AMERICA,
PLAINTIFF

-vs

DAYNA R. PATRICK LAYMAN,
DEFENDANT

CRIMINAL ACTION
#95-CR-96

BEFORE: THE HONORABLE JAMES C. TURK
DISTRICT JUDGE

ROANOKE, VIRGINIA
May 30, 1996

STENOGRAPHIC REPORT OF EXCERPTS FROM THE HEARING HELD IN THE CASE OF THE UNITED STATES OF AMERICA, PLAINTIFF, VERSUS DAYNA R. PATRICK LAYMAN, DEFENDANT, CRIMINAL ACTION #95-CR-96, IN ROANOKE, VIRGINIA ON MAY 30, 1996, AS HEARD BEFORE THE HONORABLE JAMES C. TURK, DISTRICT JUDGE.

APPEARANCES: JOSEPH MOTT, ESQ.
ASSISTANT UNITED STATES ATTORNEY
PO BOX 1709
ROANOKE, VIRGINIA 24008

COUNSEL FOR THE GOVERNMENT

JOHN E. LICHTENSTEIN, ESQ.
PO BOX 601
ROANOKE, VIRGINIA 24004-0601

COUNSEL FOR THE DEFENDANT

ROANOKE, VIRGINIA
MAY 30, 1996
2:35 P.M.

THE COURT: Ask the clerk to please call the next matter.

THE CLERK: The United States of America versus Dayna R. Patrick Layman, Criminal Action #95-65.

THE COURT: I believe this matter had been set for a hearing relative to the sentencing of Mrs. Layman. Is Mrs. Layman ready to proceed:

MR. LICHTENSTEIN: Yes, sir, Your Honor.

THE COURT: Is the United States ready to proceed?

MR. MOTT: Yes, it is, Your Honor.

THE COURT: Okay.

MR. LICHTENSTEIN: Your Honor, may we make a few brief remarks?

THE COURT: Yes. sir.

MR. LICHTENSTEIN: Your Honor, we are here today regarding the court's continuing sentencing of Ms. Layman and here today pursuant to a subsection of the guidelines and without a request that the court change the sentence per se. What the court did was impose sentence on the 17th and we filed the following Tuesday - that was a Friday - and the following Tuesday we filed this motion and the court

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awarded us this opportunity to be heard. As the court knows better than counsel, Rule 35 of the Rules of Criminal Procedure allow the court to take certain actions if the court

deems that a sentence needs to be corrected for some reason. The court ---

THE COURT: Well, the court has entered no imposition of sentence at this time.

MR. LICHTENSTEIN: Yes, sir.

THE COURT: I have in all of the other cases, but I have not in this one since you filed your motion.

MR. LICHTENSTEIN: That is why we are here, Your Honor. We appreciate the opportunity to be heard because without an imposition of sentence we are not - and the point we were going to make - we do not fall under those time frames. We are here asking the court to consider this matter for sentencing purposes.

Judge, our motion is very, very narrow and very limited. It is solely to allow Mrs. Layman the opportunity to have home confinement for the nine (9) months that is her sentence. This court ruled a level ten (10) and made findings of fact preliminarily and that is solely our request. We are not asking that the nine (9) be changed to any other number. That is our sole request and we'd ask the court to hear a brief amount of evidence in that regard.

MR. MOTT: Judge, in response, I know the court has not entered an order yet, but the only rule that can be received at this point is Rule 35 and I think it's clear that 35(A) and (B) don't apply. The only rule that could be proceeded under is 35(C) and it used to be ---

THE COURT: How about just the general sentencing law because there has been no imposition of sentence in this case.

MR. MOTT: Judge, I think under the Townson case at 33 F 3rd 1230, that basically determined, required of the Fourth Circuit to determine what Congress meant by imposition of sentence under Rule 35 and it held that imposition of sentence is when the court orally pronounces sentence in the case.

THE COURT: Well, in the Townson case though that you furnished me the court just on its own motion twenty-one (21) days after sentence was imposed changed it and I think the appellate court rightly said you can't do that.

MR. MOTT: The other case that I've brought to the court's attention and provided a copy to counsel is ---

THE COURT: United States versus Fraley

MR. MOTT: Which is a very similar factual setting. The court imposed a ten (10) month sentence and then some time later the defendant moved for an alternation or reconsideration and ---

THE COURT: And so he had to file an amended commitment order.

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MR. MOTT: That is the situation and I ---

THE COURT: And there's been no commitment order in this case.

MR. MOTT: No, sir. That's clear. I just think under Rule 35 the sentence has been imposed and the only jurisdiction at this point is for correction of technical or clerical errors. This isn't at least what the Fourth Circuit considers a clerical or technical error. So from that standpoint I think it's a jurisdictional matter.

THE COURT: Right. I don't know that I'm going to change it, but I'm going to give the defendant --- I'm really reopening the sentence or continuing and I'm going to give the defendant an opportunity to put on any evidence that she wants to put on.

MR. MOTT: Your Honor, and beyond those jurisdictional objections to proceeding today. I just don't think it would be right to change the sentence given the sentencing within other cases and both within this case. It

just wouldn't be fair, wouldn't be right to modify the sentence that has been imposed in Mrs. Layman's case.

THE COURT: All right. Would you call your first witness?

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THE COURT: Is there anything you want to say on behalf of Ms. Layman at this time:

MR. LICHTENSTEIN: your honor, today in the courtroom is Ms. Layman's mother, Mr. Layman's mother, Ms. Layman's godfather and family friend Mr. Bernstein, Mr. Freeman, Mr. and Mrs. Cooper who are extremely involved in the Iris Society and have been aware also of Dayna's work in growing the stock which could be a business.

Your Honor, I don't have a lot to say. What I do have to say, first, on the law that's been cited by the government is that we are familiar with the Frailey case. In the Fraley case, Your Honor, there was a sentencing hearing on June 5th of 1992. Mr. Frailey stayed out and began his sentence over a month later without anything ever having been filed with the court on July 8, 1992 and two (2) months later, two (2) months later on July --- two and a half (2½) months later on September 25th, 1992 he filed a motion with the court. That's not at all where we are. Mrs. Layman is very much appreciative of the fact that before sentence is imposed in the case she could have a hearing solely for this subsection.

When I look, Your Honor, at the goals of a sentencing

in this case and I see such an unusual case, a conspiracy case, guilty pleas, guilty pleas by Ms. Layman - that was quite a decision on her part I assure the court - but the kind of people who are the Laymans are as acknowledged by the government, as acknowledged in this court by the agents and the type of family bonds that they have shown both for their children and each other and for other people associated with this case including the Government's representatives, including Mr. Mott, very difficult relationships to keep. That is the type of people these are.

And when I look at the goals to be accomplished by sentencing, even under these strict guidelines, Your Honor, the goal of deterrence, by this experience of eighteen (18) months of wondering where life was going to go for a young woman who is significantly younger than her husband who has testified under oath as to his activities as opposed to hers, she has admitted to what her involvement was, that goal of deterrence has been met. The goal of education, the goal of fifteen (15), twenty (20), fifty (50) years from now, that deterrent goal has been met. And the goal of rehabilitation, Your Honor, has been met. Mrs. Layman wants to do some very, very definitely constructive things. She wants to take care of these two (2) children to the extent that she can while Mr. Layman is in prison. She wants to try to continue her home, everything else she has lost economically. She wants

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...entered in this case.

MR. MOTT: That's correct, But I think my point is that ---

THE COURT: And so in the two (2) cases you gave me, you know, the judgment order had to be amended.

MR. MOTT: That's correct.

THE COURT: Right.

MR. MOTT: But they also held that, you know, under Rule 35 imposition of sentences at the time of the oral announcement ---

THE COURT: Well, one (1) of the cases I noticed talk about, you know, pronouncement and then the imposition and imposition I think comes when the court signs an order.

MR. MOTT: That's not what I think the Fraley case says. It says they are required to determine when imposition of sentence was under Rule 35. They said it was ---

THE COURT: Okay

MR. LICHTENSTEIN: That's the Townsend case.

MR. MOTT: The Townsend case. Fraley is the other one. And in the commentary language in Rule 35, you know, when they added that the guidelines came in, determined at sentencing, they added 35(c) to make it clear that it wasn't, you know, for the court to change its mind. It was if there was an obvious clerical or technical error. Reading from the 1991 amended language. The authority to correct a sentence is

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...arrested she gave information which helped us find the lead co-defendant, Momma, down in Florida. She cooperated as best she could. She didn't call around telling other witnesses that they needed lawyers and not to go to the grand jury without a lawyer. didn't get her brother to do it, to get a lawyer from Texas to come up and meet Mr. Selman in a motel room.

MR. LICHTENSTEIN: Judge, we're going to object to that, that is just --- To suggest that Mrs. Layman had a lawyer in Houston and is responsible for his actions ---

THE COURT: Well, this is a closing argument. I'll permit him ---

MR. LICHTENSTEIN: I'm sorry.

MR. MOTT: No calls to co-defendants or witnesses telling them, you know, don't talk to the police, they'll just try to bluff you and intimidate you, none of that. And Ms. Simpkins cooperated from the outset and was prepared to testify at trial only didn't have to. You know, she got a 5(k) motion and she got a twenty-four (24) month sentence despite, you know, all the differences and then, you know, I go across to the mini courtroom and, you know, now in a, from many standpoints, from many perspectives, a much more aggravated offense. It's a long period of time involving a lot more money. A different drug, admittedly, marijuana versus crack cocaine. But in every sense a more aggravated offense and

now the defendant is asserting that, you know, nine (9) months is way too much. And I was just struck by the difference in those two (2) cases, you know, coming close on the heels of one another.

And so between cases, you know, between --- out of a sense of fairness between defendants, you know, be they white collar, uppercrust or be they from Giles County, you know, selling crack in the Southeast. Just in terms of equal treatment of defendants I think the sentence imposed by the court was more than fair, at least fair from Mrs. Layman's standpoint. Even within the case, you know, we had fifty-seven (57) month sentences for Mr. Layman and Mr. Smith. We had a forty-two (42) month sentence for Mr. Selman who was basically selling it. He was downstream from the manufacturers. We had an eighteen (18) month sentence for

Mr. Christianson who wasn't involved at the level that Mrs. Layman was, you know, that was basically instructed and supplied plans by Victor Layman.

THE COURT: Well, we put two (2) on probation.

MR. MOTT: That's correct and they had gotten out of it on their own back in '92, reported it to the police and done everything they could since then to make it right. They didn't have to ---

THE COURT: The evidence that the court has heard, Mrs. Layman had gotten out of the business.

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MR. MOTT: Well, there was very conflicting evidence on that point, Your Honor. That's some of the things we brought out at the sentencing hearing.

THE COURT: She supposedly had started Perennial Pleasures, you know, a legitimate business.

MR. MOTT: Well, and again, I think the evidence was equally clear that there were no --- that business, if it ever started, didn't start until --- wasn't planned to start until 1995. No income was ever claimed from that business. Indeed, no tax returns were filed by Mrs. Layman in 1993 or 1994 and slightly over seventy-one hundred dollars ($7,100.00) was reported in income in '91 and '92 despite all the currency deposits and the apparent income that she had. Again, Ms. Layman has minimized her role in it. You know, basically she has owned up to manicuring a couple of buds. That wasn't the evidence from others that were involved in the Musical Lane and Springtree Houses, at least. And the circumstantial evidence was presented at the previous hearing and I won't rehash that except to mention the fingerprint on the dish at one of the grow houses where marijuana was being manufactured. Mrs. Layman's

roommate was the one the power bill was put in, the false notarization of Mr. Layman's signature and the false name. Again, we brought all that out at the sentencing. But my whole point is that, you know, in a sense of fairness to other cases it was an appropriate sentence on May the 17th.

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Within this case it was in appropriate sentence on May the 17th. It's still an appropriate sentence today and from a sense of finality and determinativeness there should be some finality in court judgments and I think that also indicates towards leaving the sentence as it was, and it was a good sentence then and there is no reason to disturb it at this point.

THE COURT: Ms. Layman, would you stand up along with your attorney? Ms. Layman, the court, you know, heard evidence in the case on May the 14th and I'm considering this a continuation of that hearing. I made findings of fact at that time concerning the amount of the marijuana for which you are accountable and your criminal history category and so I'm adhering to those findings. At that time I said it was the judgment of the court that you be committed to the Bureau of Prisons for a period of incarceration of nine (9) months. I'm adhering to that, but I'm going to impose home detention as a substitution for the imprisonment and when you complete the nine (9) months home detention you'll be placed on supervised release for thirty-six (36) additional months under the same conditions and so forth as the court has already announced.

Now, do you want to begin the home detention on August the --- When did I tell you ---

MS. LAYMAN: August 5th.

THE COURT: Is that when you would like to begin the

home detention?

MS. LAYMAN: Yes, sir.

THE COURT: And I'm going to make as an additional requirement that you pay for the cost of the home monitoring and I think that runs about five dollars ($5.00) a day. Is that right?

MR. PRICE: Yes, sir.

THE COURT: And so I'm substituting home detention for actual incarceration.

MS. LAYMAN: Thank you.

THE COURT: And the home detention will begin on August 5th. You can get everything --- and you'll explain to her in detail what home detention is. What home detention really means is that other than when you are away at legitimate work or going to church or going to the doctor, this type of activity, you're required to, you know, be at home and you'll be on an electric monitor that will check on you from time to time to see that you aren't out partying around or what not. All right. And I find that the court has authority to do this since this is really a continuation of the sentencing hearing on May the 17th and the court has, as of this date, not entered any commitment order. But I'll try to get an order entered in the next day or two.

MS. LAYMAN: Thank you.

MR. LICHTENSTEIN: Your Honor, may I ask one (1) other

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finding: I just wanted to say for the record that previous to today Ms. Layman had not asked the court yet to see the

home confinement subsection as part of that and that was the purpose for coming here. That had not been raised before.

THE COURT: Right. Well, the Probation Officer will go over it with you in detail.

MR. LICHTENSTEIN: Thank you, Your Honor.

MR. MOTT: Your Honor, on that point I believe a term of probation is also authorized. I think the court previously imposed a term ---

THE COURT: I was going to call you up to the bench and ask you if you wanted probation or supervised release, but that would be changing the sentence and I'm not changing the sentence that I imposed. I'm just adding one (1) additional sentence and substituting home detention for -- - if both of you can agree, the Government would be in a stronger position if she were on probation rather that supervised release. And if you aren't going to appeal it I'll be happy to change it to probation.

MR. MOTT: That's my point, Your Honor. I think it does result in more stringent controls on ---

THE COURT: It does.

MR. MOTT: In a sense of being able to keep it going longer.

THE COURT: Well. if you ask the court then to substitute

probation for supervised release I'll do that and make it, you know, the nine (9) months home detention as a condition of probation.

MR. MOTT: And I assume there would be a three (3) year term of probation under the same conditions previously announced?

THE COURT: Well. then I would add on a little additional time if she were on probation.

MR. MOTT: Judge, without agreeing that it's appropriate to change the sentence at all, I'm not conceding that ---

THE COURT: Well, if you ask me to do that then I'll do that. But if you're going to appeal, which you have --- and I want everybody to appeal anything that this court does that you feel isn't correct. But if it's going to be appealed I think that I ought to leave it like it is.

MR. MOTT: I think there's a good possibility of that, Your Honor. I'd be disingenuous if I didn't ---

THE COURT: Okay, I'm going to leave it like it is then. Okay, Let's take about a two (2) minute recess and then we have another matter to take up. Ask the Marshal to declare about a two (2) minute recess.

(Proceeding is concluded)

CERTIFICATE

I, Clara L. Whitlock, Official Court Reporter for the United States District Court for the Western District of Virginia, Roanoke Division, hereby certify that the foregoing is a true, accurate and complete transcript of the hearing held in the case of The United States of America, Plaintiff, versus Dayna R. Patrick Layman, Defendant, Criminal Action #95-CR-65, in Roanoke, Virginia on May 30, 1996 as heard before the Honorable James C. Turk, District Judge.

Clara L. Whitlock
OFFICIAL COURT REPORTER

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA,
PLAINTIFF

VERSUS

DAYNA R. P. LAYMAN,
DEFENDANT

CRIMINAL ACTION 95-CR-65

BEFORE HONORABLE JAMES C. TURK
DISTRICT JUDGE

RESENTENCING

ROANOKE, VIRGINIA
JUNE 4, 1996

STENOGRAPHIC REPORT of the resentencing held in the case of the United States of America, Plaintiff, versus Dayna R. P. Layman, Defendant, Criminal Action #95-CR-65, in the United States District Court for the Western District of Virginia, Roanoke Division, before the Honorable James C. Turk, District Judge, on the 4th of June, 1996 in Roanoke, Virginia.

APPEARANCES: Joseph W. H. Mott, Esq.
Assistant United States Attorney
Roanoke, Virginia

Counsel for the Government

John E. Lichtenstein, Esq.
PO Box 601
Roanoke, Virginia 24004-0601

Counsel for the Defendant

Page 1

June 4, 1996
Roanoke, Virginia
3:05 P.M.

THE COURT: Ask the clerk to please call the next case.

THE CLERK: The United States of America versus Dayna Patrick Layman, Criminal Action #95-CR-65

THE COURT: I asked the clerk to bring the parties in on this case this afternoon. The Probation Officer tells me that the sentence that the court announced last Friday is an illegal sentence under the statute and the guidelines, that it must be changed. So what the court --- the court has entered no order in the case. So rather than sentencing her to nine (9) months of supervised release and so forth, I'm going to place Mrs. Layman on probation for a period of Thirty-six (36) months. An all of the other terms under the supervised release will apply to the period of probation. She will be on home detention or house arrest for a period of nine (9) months and she'll be required to pay the cost of the electric monitoring during the nine (9) months period. And then she will serve the remaining, what is it? Twenty-five (25) months, you know, without any electric monitoring and she will not be on house arrest, but for nine (9) months. And the terms previously announced

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will be incorporated in the order.

MR. LICHTENSTEIN: Yes, sir.

THE COURT: Now, that changes things a little bit. Mrs. Layman, if you're of good behavior, if you stay out of

trouble, if you don't violate federal or state laws, then at the end of the thirty-six (36) months or sooner, if the court takes you off of probation you will have fulfilled your commitment, you will be released. But if you were to violate the terms of the probation, if you were to get back into trouble, into some illegal activity or whatnot, violate the terms of the probation, then on a motion by the government to revoke your probation, for good cause, the court could revoke your probation and then I could sentence you under the guidelines the same as if you had not been on probation.

Do you understand that?

MRS. LAYMAN: Yes, sir.

THE COURT: You understand the importance of staying out of trouble and doing what the probation officer tells you to do?

MRS. LAYMAN: Yes, sir.

THE COURT: Now, you still want to start it in August?

MRS. LAYMAN: Yes. I just have one question I would like to address to the court or to Mr. Price. And that is, my husband is going to be going to, I assume, Beckley that

same day. And I would like to be able to drive with him to --

THE COURT: To take him to Beckley. There would be no problem with that.

MR. PRICE: Your Honor, we can just start home confinement on August the 6th, the day after that.

THE COURT: That's all right.

And the court without any other delay is going to go ahead and enter judgment in the case so that the government can go ahead with its appeal

MR. MOTT: Your Honor, I assume that the home detention is being imposed as a condition of probation.

THE COURT: Yeah, that's what I thought I said, that I'm making as one of the special terms of the probation that she be on home detention for a period of nine (9) months. And that she pay for the cost of the electric monitoring, which I think is about five dollars ($5.00) a day.

Then I make the --- Let's see, in the other one did I make --- did I require her to pay for the cost of her supervised release?

MR. PRICE: No, sir, you found that she could not afford to pay ---

THE COURT: And I'm making that same finding, that she will not have funds to pay for the cost of probation, so I'm going to waive that.

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And I'll look at the order with a discerning eye before I sign it.

Any other matter to come before the court at this time? If not, I'll ask the Marshal to declare a short recess.

(PROCEEDING IS CONCLUDED)

CERTIFICATE

I, Clara L. Whitlock, Official Court Reporter for the United States District Court for the Western District of Virginia, Roanoke Division, do hereby certify that the foregoing transcript is a true and accurate record of the resentencing hearing held in the case of the United States of America, Plaintiff, versus Dayna R. P. Layman, Defendant, Criminal Action #95-CR-65, as heard before the honorable James C. Turk, District Judge, in Roanoke, Virginia on the 4th, of June, 1996.

Clara L. Whitlock

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Supreme Court, U.S.
FILED
JAN 21 1998
CLERK

(3)

No. 97-698

In the Supreme Court of the United States

OCTOBER TERM, 1997

DAYNA R. PATRICK LAYMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

17 pp

QUESTION PRESENTED

Whether a sentence is "imposed" under Federal Rule of Criminal Procedure 35 when it is orally announced at a defendant's sentencing hearing.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-698

DAYNA R. PATRICK LAYMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 116 F.3d 105.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1997. A petition for rehearing was denied on July 22, 1997. Pet. App. 11-12. The petition for a writ of certiorari was filed on October 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following her plea of guilty in the United States District Court for the Western District of Virginia, petitioner was convicted of conspiring to manufacture and distribute marijuana, in violation of 21 U.S.C. 846.

The district court sentenced her to a term of 36 months' probation, including a nine-month period of home detention with electronic monitoring.[1] Pet. App. 3-4. On the government's appeal, the court of appeals vacated petitioner's sentence and remanded for resentencing. *Id.* at 1-10.

1. In 1988, petitioner and her husband, Victor Layman, approached George and Cheryl Fender with a plan to grow large quantities of high-quality marijuana in the vicinity of Roanoke, Virginia. The conspirators divided responsibilities for the enterprise among themselves: the Fenders would cultivate the marijuana in "grow houses" financed by Joe Bennett Smith, while Victor Layman would process and distribute the marijuana. Eventually the conspiracy expanded to include other persons who operated additional grow houses. The conspiracy continued until 1995, when the participants were indicted. Pet. App. 3.

2. On Friday, May 17, 1996, petitioner appeared for sentencing. The district court determined that her Guidelines range was 6-12 months' imprisonment and sentenced her to a term of nine months' imprisonment, to be followed by a 36-month period of supervised release. Pet. App. 45-46. The court did not file a written judgment and commitment order at that time. *Id.* at 3.

Over the following weekend, petitioner and her husband each wrote a letter to the district court requesting that the court modify its earlier sentence

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[1] Co-defendant Joe Bennett Smith likewise pleaded guilty to conspiring to manufacture and distribute marijuana, and was sentenced to a term of 57 months' imprisonment. Pet. App. 1, 4.

and place petitioner in home detention. Petitioner subsequently filed a motion that formally requested that her sentence be modified. At a May 30, 1996, hearing on the motion, the district court stated that its earlier oral pronouncement of sentence on May 17, 1996, did not constitute an "imposition of sentence" within the meaning of Federal Rule of Criminal Procedure 35(c). That Rule provides that "[t]he court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." The government objected to any resentencing of petitioner on the ground that sentence had been "imposed" on May 17, and that the conditions of Rule 35(c) had not been satisfied. Pet. App. 57. The district court rejected that contention, reasoning that it had not yet "imposed" sentence because it had not entered a written order. *Id.* at 60. It then sentenced petitioner to a term of nine months' home confinement, to be followed by a 36-month period of supervised release. The court said that it adhered to its previous sentence, but was substituting home confinement for imprisonment. Pet. App. 3-4; Gov't C.A. Br. 3.

The probation office subsequently notified the district court that the May 30, 1996, sentence was illegal.[2] The court scheduled a hearing for June 4, 1996. At that hearing, the court placed petitioner on probation for a period of 36 months, with nine months of home detention as a condition of probation. The

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[2] Under Guidelines § 5C1.1(c)(2), the district court could have sentenced petitioner to a term of supervised release that included home detention, but only if at least one month of the sentence involved imprisonment. See Pet. App. 4 n.1.

court filed its judgment and commitment order on June 5, 1996. Pet. App. 4; Gov't C.A. Br. 3-4.

3. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 1-10. The court of appeals initially observed that "[t]he authority of the district court to modify a sentence pursuant to [Fed. R. Crim. P.] 35(c) is severely limited," and that Rule 35(c) does not permit a sentencing court merely to change its mind about a sentence. Pet. App. 5. The court of appeals then held that "a sentence is imposed for purposes of Rule 35(c) when it is orally pronounced by the district court." *Id.* at 6.[3] The court explained that its conclusion was based on the Sixth Amendment, which gives a defendant the right to be physically present at sentencing. *Ibid.* Moreover, the court reasoned that "a rule that sentence is 'imposed' when it is orally pronounced better promotes the goal of finality in sentencing." *Ibid.* Accordingly, the court of appeals concluded that the district court had imposed sentence on petitioner within the meaning of Rule 35(c) at the May 17, 1996 hearing. *Id.* at 7.

The court of appeals also found that the later modification of petitioner's sentence was based not on the correction of an "arithmetical, technical, or other clear error" under Rule 35(c), but "rather was the product of a change of heart by the sentencing judge." Pet. App. 7. The court of appeals therefore vacated

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[3] The court of appeals noted (Pet. App. 6) that the Second and Tenth Circuits had reached the same conclusion (*United States* v. *Abreau-Cabrera*, 64 F.3d 67, 73-74 (2d Cir. 1995); *United States* v. *Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994)), but that the Seventh Circuit had reached a contrary conclusion (*United States* v. *Clay*, 37 F.3d 338, 340 (7th Cir. 1994)).

petitioner's sentence and remanded with instructions that the district court impose the sentence pronounced at the May 17, 1996 hearing. *Ibid.*[4]

ARGUMENT

Petitioner argues (Pet. 5-29) that the court of appeals erred in holding that the district court lacked authority to modify petitioner's sentence after the initial oral pronouncement of sentence, and that this Court should grant review because the courts of appeals are divided on that issue. Those contentions lack merit.

1. Before November 1, 1987, the effective date of the Sentencing Guidelines, a district court had authority to reduce a sentence pursuant to a motion filed within 120 days of the imposition of sentence. The Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, however, restricted the authority of a district court to modify a sentence "to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." 18 U.S.C. 3582(c)(1)(B). With the advent of the Guidelines, Congress amended Rule 35 to eliminate the 120-day period in which a district court had power to modify a sentence. The effect of that amendment was generally to ensure that "the sentence imposed in the public forum or during the sentencing hearing would remain constant, immune from later modification." *United States* v. *Cook*, 890 F.2d 672, 675 (4th Cir. 1989). The district court, however, retained jurisdic-

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[4] The court of appeals also rejected co-defendant Smith's contention that because the government had not seized any live marijuana plants, the district court had erred in applying the 100 gram-per-plant ratio found in the Sentencing Guidelines. See Pet. App. 7-9.

tion to correct an "acknowledged and obvious mistake" within the time period for the filing of a notice of appeal by any party. *Ibid.* That narrow authority did "not extend to a situation where the district court simply changes his mind about the sentence." *Ibid.*

In 1991, Rule 35 was again amended to add subdivision (c), which codified in part the result reached in *Cook* and *United States* v. *Rico*, 902 F.2d 1065 (2d Cir.), cert. denied, 498 U.S. 943 (1990), but imposed a more stringent time requirement. The amended rule allows a district court "within 7 days after the imposition of sentence[] [to] correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(c). The Advisory Committee Notes to the 1991 Amendment make it clear that the authority to correct a sentence is narrow and that the Rule is not intended to allow a sentencing court simply to change its mind:

> The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). *The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence.* Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines.

Fed. R. Crim. P. 35 Advisory Committee Note (1991 Amendment) (emphasis supplied). The Advisory Committee considered and rejected a proposed amendment that would have permitted modification based on new evidence within 120 days of sentencing, because that amendment would have injected an element of uncertainty into the determinate sentencing scheme. *Ibid.* "Thus, the addition of subsection (c) to Rule 35 demonstrates that district courts are to have only limited authority to correct sentences upon the defendant's motion, and Rule 35(c) fully defines the scope of that authority." *United States* v. *Fraley*, 988 F.2d 4, 7 (4th Cir. 1993). Because the district court's basis for modifying petitioner's May 17, 1996, sentence does not meet the limited criteria of Rule 35(c), the court of appeals correctly held that petitioner's sentence could not be altered simply based on "a change of heart by the sentencing judge." Pet. App. 7.[5]

Contrary to petitioner's contention (Pet. 7-12), the court of appeals also correctly held that the seven-day time period under Rule 35(c) begins when the district court orally imposes a sentence. The express terms of Rule 35(c) are not limited to entry of a written order but apply to a court's "imposition of sentence." On May 17, 1996, the sentencing court unequivocally

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[5] Petitioner does not contend that the district court had authority to amend her sentence under any other provision of law. See Fed. R. Crim. P. 35(a) (correction of sentence on remand); Fed. R. Crim. P. 35(b) (reduction of sentence based on government's motion for substantial assistance); Fed. R. Crim. P. 36 (correction of clerical errors); 18 U.S.C. 3582(c)(1) and (2) (modification of sentence upon motion of Director of Bureau of Prisons or when Sentencing Commission has lowered sentencing range).

imposed a sentence of confinement and supervised release. Pet. App. 45.[6] That the "imposition of sentence" occurs at the oral pronouncement of sentence, rather than at the time of the entry of the written judgment, is confirmed by Federal Rule of Criminal Procedure 32, which describes the steps for "imposition of sentence" in subsection (c)(3) separately from the entry of the written "judgment" in subsection (d).

Moreover, tying the imposition of a sentence under Rule 35(c) to the entry of a written judgment of conviction would be inconsistent with the defendant's constitutional right to be present at sentencing. As the court of appeals explained:

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[6] Contrary to petitioner's suggestion (Pet. 4, 8), the court did not conditionally sentence petitioner on May 17, 1996. The sentencing transcript makes clear that the judge merely agreed to permit petitioner's counsel to notify the court by the following Monday of the particular prison that petitioner preferred. Pet. App. 46-47. The designation of the place of imprisonment, however, is solely entrusted to the Bureau of Prisons, 18 U.S.C. 3621(b), which takes into consideration a variety of factors, including any recommendations of the sentencing court. 18 U.S.C. 3621(b)(4)(B). Petitioner also errs in relying (Pet. 9-11) on 18 U.S.C. 3582(b), which makes the judgment of conviction a "final judgment" notwithstanding that a sentence may be modified under specified conditions, and the Advisory Committee Notes to Federal Rule of Appellate Procedure 4(b) (1993 Amendment), which state that "in a criminal case, a posttrial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment." Neither Section 3582(b) nor the notes to Federal Rule of Appellate Procedure 4(b) purport to address the "imposition of sentence" under Federal Rule of Criminal Procedure 35(c).

> It is well established that a sentence orally imposed governs a conflicting, later-written sentence of the court. This rule is grounded in the Sixth Amendment which requires that a defendant be physically present at sentencing. When a judgment of conviction containing the sentence is officially entered of record, only members of the clerk's office are present. This cannot be what Congress meant in Rule 35(c) by 'imposition of sentence' in light of the Sixth Amendment.

Pet. App. 6 (quoting *United States* v. *Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994)). Recognizing that a sentence is imposed on the date of oral pronouncement also advances the purpose of Rule 35(c) to promote the finality of a sentence. See *United States* v. *Abreau-Cabrera*, 64 F.3d 67, 74 (2d Cir. 1995) (interpreting Rule 35(c) to require that sentence is imposed on date of oral pronouncement "best effectuates the intent of the rule's drafters—finality in sentencing"). The rule advanced by petitioner would have the opposite effect and would permit a sentencing court, like the district court here, "simply to change its mind about the appropriateness of the sentence." Fed. R. Crim. P. 35 Advisory Committee Note (1991 Amendment).

2. Contrary to petitioner's contention (Pet. 14-19, 22-23), there is no square conflict in the courts of appeals on the question whether a sentence is imposed under Rule 35(c) when it is orally pronounced, or when it is reduced to a written judgment of conviction. In *United States* v. *Clay*, 37 F.3d 338, 340 (7th Cir. 1994), the Seventh Circuit did state that "[t]he date of 'imposition of the sentence' from which the seven days [in Federal Rule of Criminal Procedure

35(c)] runs signifies the date judgment enters rather than the date sen-tence is orally pronounced." But that statement was not necessary to the judgment. The issue in *Clay* was whether the defendant had filed a timely notice of appeal when he did so after the judge had originally imposed sentence, but before the judge entered an order declining to reconsider the sentence.[7] The court held that the defendant's first notice of appeal, filed after the original imposition of sentence, was sufficient. It explained that, even treating the district court's consideration of modifying the defendant's sentence as the court's own motion under Rule 35(c), the "filing of a motion under Fed. R. Crim. P. 35(c) [does not] affect the validity of a notice of appeal filed before entry of the order disposing of the motion." *Clay*, 37 F.3d at 340 (quoting Fed. R. App. P. 4(b)).[8] *Clay* therefore turns on the principle that a notice of appeal filed before the

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[7] The chronology of events was as follows: the judge sentenced Clay on October 28; Clay filed a notice of appeal on November 2; the judge entered an order staying the October 28 sentence in order to reconsider the question of acceptance of responsibility in light of a new decision of the court of appeals on November 3; the judgment of conviction was entered on the docket on November 5; the judge determined not to modify the sentence on November 9; and Clay filed a second notice of appeal on November 12. See *Clay*, 37 F.3d at 340. It is not clear from the court of appeals' opinion whether the October 28 sentence was oral or written.

[8] In relevant part, Federal Rule of Appellate Procedure 4(b) states: "The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. 35(c), nor does the filing of a motion under Fed. R. Crim. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion."

disposition of a motion under Rule 35(c) is timely and that a second notice of appeal is not necessary after disposition of such a motion. See 37 F.3d at 340-341 ("Clay's first notice of appeal adequately secured review of his conviction and sentence by this court; his second notice of appeal was superfluous."). The court of appeals was not required to decide the issue presented here, *i.e.*, whether a modification of a sentence after its oral imposition was permissible under Rule 35(c).[9]

Petitioner errs in asserting (Pet. 15) that the First, Eleventh, and District of Columbia circuits have addressed the question presented in this case. In *United States* v. *Fahm*, 13 F.3d 447, 452-453 (1st Cir. 1994), it appears that the sentence was pronounced and the judgment entered on the same day, so that the court had no occasion to consider the issue of when sentence is imposed under Rule 35(c). Although the First Circuit in *Fahm* noted that it had suggested in *United States* v. *Morillo*, 8 F.3d 864, 866 (1993), that "imposition of sentence" under Rule 35(c) occurred when judgment was entered, the court in *Fahm* also noted that the suggestion was dictum. 13 F.3d at 453. Moreover, the decisions in *In re United States*, 898 F.2d 1485 (11th Cir. 1990), and *United States* v. *Jordan*, 810 F.2d 262, 266 (D.C. Cir.), cert. denied, 481 U.S. 1032 (1987), were rendered before the

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[9] Nor did the Seventh Circuit's decision in *United States* v. *Turner*, 998 F.2d 534, cert. denied, 510 U.S. 1026 (1993), on which the court in *Clay* relied, address whether a court may modify a sentence under Rule 35(c) more than seven days following oral pronouncement of a sentence. *Turner* also involved the question of the time-liness of an appeal and had no occasion to address the question presented in this case. 998 F.2d at 536.

1991 amendment to the Federal Rules of Criminal Procedure that resulted in the present Rule 35(c).[10]

Petitioner also errs in arguing (Pet. 13-14) that the decision of the court of appeals conflicts with *Lemke* v. *United States*, 346 U.S. 325 (1953), *Hill* v. *Wampler*, 298 U.S. 460 (1936), *Corey* v. *United States*, 375 U.S. 169 (1963), or *Korematsu* v. *United States*, 319 U.S. 432, 435 (1943). Those decisions were rendered well before the Sentencing Reform Act of 1984 and the 1991 Amendment to Rule 35.

3. Finally, petitioner makes a series of policy arguments (Pet. 23-29) that are more appropriately addressed to Congress or the Sentencing Commission than to the Court. In particular, petitioner's suggestion (*id.* at 27-28) that the decision of the court of appeals conflicts with the Sentencing Guidelines, or judicial interpretations of the Guidelines, is within the Sentencing Commission's competence to resolve. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991).

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[10] Petitioner also asserts (Pet. 18 n.3, 19-22) that multiple intra-circuit conflicts have arisen on when a sentence is imposed under Rule 35(c). Intra-circuit disagreements, however, do not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS M. GANNON
Attorney

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